



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

WINDING-UP CAUSE NO. 22 OF 2006

IN THE MATTER OF UNITED INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF COMPANIES ACT, CHAPTER 486

OF THE LAWS OF KENYA

AND

IN THE MATTER OF INSURANCE ACT, CHAPTER 487

OF THE LAWS OF KENYA

RULING

1. This Petition was commenced in the setting of the repealed Companies Act (Cap. 486) and is the applicable law in respect to these proceedings.
2. Under that statute are the Companies Winding-Up Rules. Rule 25 provides:-

“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by one of the petitioners if more than one, or, where the petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be *prima facie* evidence of the contents of the petition”.
3. Margaret Wambugu (an opposing Creditor) asserts that the Petition has been presented in a manner that infracts on that Rule and it can go no further. In a Notice of Preliminary Objection of 30th May 2019 that Creditor states that:-
 1. The Petition dated 31st August 2006 and filed in Court on 5th September 2006 having not been evidentially verified, marked or identified by the verifying affidavit of Sammy Mutua Makove sworn and filed in Court on 7th September 2006 in violation of Rule 25 of the Companies (winding-up) Rules under the Companies Act – Cap 486 (Repealed) is fatally and incurably defective and the same should be struck out with costs to the Respondents and interested parties who have appeared in the Petition.
 2. The Jurisdiction of the Court to hear a winding-up Petition under Section 218 of Cap 486 (Repealed) and grant any orders is underpinned on the validity of the Petition and in the absence of a valid winding-up Petition verified in accordance with Rule 25 which forms the evidentiary basis upon which the hearing of the Petition proceeds, the Court must of necessity strike out and/or dismiss the Petition in limine.
 3. The above fundamental and incurable defect in the Petition having been raised in these proceedings and an attempt to rectify and cure the same through an application dated 30th March 2009 by the Petitioner having failed before this Honourable Court and in the Court of Appeal, the resultant obvious consequence is for this Honourable Court to strike out and dismiss the Petition dated 31st August 2006 and filed in Court on 5th September 2006 together with the Amended Petition dated 16th July 2007 and filed in Court on 17th July 2007 with costs to all the opposing creditors who filed notices to appear and participated in the proceedings herein.
4. It is argued that the jurisdiction of this Court to hear a Winding-up Petition under Section 218 of the repealed statute and to grant any orders is underpinned on the validity of the Petition. And so in the absence of a valid Winding-up Petition verified in accordance with Rule

25 which forms the evidentiary basis, then the Petition must necessarily be struck out or dismissed *in limine*.

5. It is observed that an attempt to rectify and cure the defect was unsuccessful when the Court dismissed the Petitioner's application of 30th March 2009 (and filed on 21st March 2009) and when an appeal therefore was struck out.

6. On his side, the Petitioner gives a background to the manner in which the Petition was presented.

7. It was filed on 5th September 2006 and on 7th September 2006 the Petitioner filed the Affidavit Verifying the Petition (AVP) with 9 exhibits. On 17th July 2007, the Petitioner, with leave of the Court filed an Amended Petition.

8. Then the Application dated 30th March 2007. It was an application by the Petitioner for leave to file a supplementary affidavit. The grounds advanced were that due to oversight on the part of the advocate appearing for the Petitioner, she had omitted to annex the copy of the Petition to the AVP and also that the Petition filed on 5th September 2006 was not marked 'A'.

9. The Court has considered arguments for and against the Preliminary Objection.

10. The Court does not doubt that the Statutory Verifying Affidavit filed under Rule 25 is the *prima facie* evidence of the contents of the Petition and without a proper Statutory Verifying Affidavit then the Petition is fatally defective. This proposition of law is so notorious that it is hardly profitable to cite any of the many decisions that uphold it.

11. But so as to determine whether the deficiency in the Affidavit of 5th September 2006 is so fundamental that it cannot be regarded as an affidavit under Rule 25, the object of the Rule must be understood. Let me reproduce the Rule again;

“Every petition shall be verified by an affidavit, which shall be sworn by the petitioner, or by one of the petitioners if more than one, or, where the petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the petition is presented, and such affidavit shall be *prima facie* evidence of the contents of the petition”.

12. Palmer's Company Law (13th edition) suggests the object to be “to prevent the abuse of putting upon the file long affidavits in support of the Petition which may turn out to be unnecessary”. A Petition may contain sufficiently detailed statements which can be verified by the statutory affidavit and therefore turned into *prima facie* evidence without the need of rehashing them in other affidavits. This is a more mundane object.

13. The requirements that the statutory affidavit is not only filed but sworn days after the Petition is presented but not later than four days is not idle. It has to be remembered that the statutory affidavit is the *prima facie* evidence of the contents of the Petition and so an affidavit either sworn and/or filed before or contemporaneously with the commencement of the proceedings is not satisfactory. So as to be *prima facie* evidence of the contents of the Petition, the affidavit must be to verify what has already been filed. Logically, the affidavit must be sworn and filed after the filing of the Petition. That is simple enough but I venture to say that an affidavit that predates the presentation of a Petition becomes a verifying affidavit in terms of Rule 25 if re-sworn and filed after the presentation of the Petition. And, if of course, filed within the timelines of Rule 25.

14. It is because of the significance of the foregoing that a template of an affidavit verifying a petition of a limited liability company is produced in the schedule to the Rules. It is a short Form, and I reproduced it:-

FORM NO. 11

AFFIDAVIT VERIFYING PETITION OF A LIMITED COMPANY

Iof make oath and say as follows:-

1. I am [a director] [the secretary] ofCo. Ltd, the Petitioner in the above matter, and am duly authorized by the said Petitioner to make this affidavit on its behalf.

2. Such of the statements in the Petition now produced and shown to me marked 'A' as relate to the acts and deeds of the said Petitioner are true, and such of the statements as relate to the acts and deeds of any other person or persons I believe to be true.

Sworn at

15. The contemplation of the Form (and this would be in tandem with Rule 25) is that a copy of the filed Petition is annexed as an exhibit to the verifying affidavit.

16. What then are the shortcomings of the Affidavit sworn by Sammy Mutua Makove sworn on 7th September 2006 and filed on the same day? The commencement to the Affidavit reads:-

“I Sammy Mutua Makove do hereby make oath and say that such of the statements in the Petition as relate to my own acts and deeds are true, and such of the statements as relate to acts of any other person or persons I believe to be true, I swear as follows:-”.

17. The admitted oversight is that a copy of the filed Petition is not produced as an exhibit to the affidavit. I accept it as an oversight because, from the commencement of the Affidavit, there was an intention of the Deponent to produce “the Petition”.

18. How grave is this deficiency in the circumstances of these proceedings? To the credit of the Petitioner the Affidavit is both sworn and filed on a date after the presentation of the Petition. Again it is filed within four (4) days after the Petition.

19. The title to the Affidavit is all fours that of the Petition save that the affidavit has no case number. The Affidavit is in respect to United Insurance Company and so is the Petition. It has not been demonstrated, in the least alleged, that as between the date of filing of the Petition and the date the Affidavit was filed, another Petition against United Insurance Company had been presented. Crucially, the Affidavit was filed in the same Court file as the Petition filed just two days early.

20. In my view the Affidavit Verifying Petition sworn by Sammy Mutua Makove on 7th September 2007 and filed on the same day verified the Petition herein filed on 5th September 2007. All the facts I have set out point to that inevitable conclusion. The Application of 31st March 2009 well have been needless. That Affidavit verifying the Petition passes muster Rule 25 and survives the Preliminary Objection of 30th May 2019 and I so hold.

21. Let me say something in relation to the Amended Petition of 16th July 2007. The only amendment to the original Petition is in the prayer to appoint Sheikh Abdul Zahir instead Johnson Jackson Githalia. I am not too certain that a prayer changing the proposed liquidator needs to be again verified under Rule 25. That would be pedantic without giving regard to the object of the Rule.

22. The Preliminary Objection of 30th May 2015 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Njuguna holding brief Kambuni for Petitioner

Milimo for Statutory manger

Kihara for Interested Party – Claim Settlement Committee

Kiorere for Creditor

Roluk holding brief Ithondeka for 2nd & 3rd Interested Parties

Court Assistant: Nixon