



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MILIMANI COMMERCIAL COURT**  
**WINDING-UP CAUSE NO. 42 OF 2015**  
**IN THE MATTER OF THE COMPANIES ACT (CAP. 486 OF THE LAWS OF KENYA**  
**IN THE MATTER OF WINDING UP OF CONSOLIDATED MARINE CONTRACTORS LTD**  
**(COMARCO LTD)**

**RULING**

1. The Petitioner filed a Winding Up Petition against the company Marine Contractors Limited (herein after the Company) dated 3<sup>rd</sup> November, 2015 and filed on 6<sup>th</sup> November, 2015. The Petitioner however, filed a Notice of Motion dated 28<sup>th</sup> January, 2016, seeking leave to amend the Petition in terms of the Draft Amended Petition duly annexed to the application. The application was premised on the grounds set out in the application and supported by the affidavit of Helen Atoni sworn on 28<sup>th</sup> January, 2016.
2. In brief, the Petitioner deponed that the deceased Gian Luigi Antoni was her, father and had shares in the company. That after his death, the said shares were bequeathed to the Petitioner's deceased Mother, Audrey Eunice Antoni through his last will in testament. The said Will also named the Petitioner as the Executor of the late Gian Luigi's Estate. It was further deponed that before the subject shares could be transferred to the late Audrey Eunice Antoni, she also died, and by her will in testament, the Petitioner was also named as the Executor of her estate. That in the foregoing , the Petitioner wishes to amend the Petition to reflect that she was seeking the winding up of the company in her capacity as the executor of Giani Luigi Antoni and Audrey Eunice Antoni. The Petitioner contended that no prejudice will be suffered by the company if the request was granted by the court, since the omission to state the Petitioner's capacity was inadvertent. That the amendment was designed to cure a minor anomaly and hence it would be in the interest of justice to allow the application.
3. The Company opposed the application by filing grounds of opposition dated 9<sup>th</sup> February, 2016 and a preliminary objection dated 28<sup>th</sup> January, 2016. The Company urges that the application to amend does not lie and is misconceived in law; that the winding up petition is null and void ab initio and incapable of being amended and that the Petition is fatally defective. In its preliminary objection, the company also pointed out that the Petitioner herein did not have the locus standi to present the Petition and seek relief to wind up the company on grounds of a shareholder. That further the Petition was a nullity on the grounds that it was not verified as prescribed under the law by a verifying affidavit sworn and filed within the prescribed (4) days after the commencement of the Petition. In sum, the Company urged the court to dismiss the Petitioner's application as well as the Petition.
4. On 4<sup>th</sup> February, 2016, the Parties consented to have both the application and the Notice of

Preliminary Objection heard and determined together. The same were dispensed by way of written submissions. Subsequently the Petitioner filed her submissions on 18<sup>th</sup> February, 2016, while those of the company were filed on 10<sup>th</sup> February 2016 and 26<sup>th</sup> February, 2016 respectively. I have considered the pleadings, depositions and rival submissions including the various cases cited. I propose to start with the preliminary objection by the company.

5. The law on preliminary objections is well settled. Discussing what constitutes a preliminary objection, **Law JA in Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd**[2] stated thus :-

***"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."***

6. In the words of Sir Charles NewboldP at page 701, B:-

***"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

7. Further in the case of **John MundiaNjoroge& 9 others v Cecilia MuthoniNjoroge& another [2016] eKLR**, the court held thus ;-

***"Therefore in my view, a preliminary objection can be raised on any of the following grounds:-***

- a. ***Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;***
- b. ***Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;***
- c. ***Insufficient specificity in a pleading;***
- d. ***Legal insufficiency of a pleading (demurrer);***
- e. ***Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; an***
- f. ***Pendency of a prior action or agreement for alternative dispute resolution."***

8. These are the principles to be applied when determining a preliminary point of objection. The objection before me raises the question of the Petitioner's capacity to institute a winding up petition. The Respondent pursued the line in its Preliminary Objection that the Applicant has no locus standi as she is not a member/ shareholder of the company. However the Petitioner maintains in her submission that as a personal representative of a contributor who is deceased, she is entitled to bring the instant petition under section 221 and 216 of the Companies Act. I have considered the opposing submissions by the parties. The following is my view on the matter.

9. In Halsbury Laws of England Vol.6 at page 262 subject on transferring of shares, it is stated that:

***"upon the death of the sole shareholder the title to his shares devolves upon his personal representative who may transfer the shares without being registered in the register of shareholders."***

10. To buttress the above point, in the English case of **Re Jermyn Street Turkish Baths Ltd (1970) 3 All ER 57** where the Court of Chancery had held that:

***". . . Even if the Petitioners were not registered as members of the company, personal representatives of a deceased member must be regarded as members of the company."***

11. Further in the Matter of **Uniconsult (K) Ltd (2008) eKLR**, the court found thus ;

*“For the purpose of the preliminary objection raised this court finds that the petitioner has Locus Standi to present petition for winding up of the company. And she is a contributory herself being a personal representative of a deceased holder of shares which devolve upon her.”*

12. Again in the case of **Kenyazuga Hardware Ltd (2005) 2 KLR 381**, the Court had held:

*“If it was found that the deceased indeed had shares, the second petitioner would then by virtue of being one of the administrators of his estate, be registered as a holder of the Shares and therefore have capacity as a shareholder or a contributor under Section 221 (1)(ii) to present a petition for winding up.”*

13. In light of the above authorities, it is my view that a personal representative or administrator to the estate of a deceased shareholder should be considered as a member of the company despite the fact that they are not in the register of the Company. Therefore a Personal representative to a deceased shareholder is entitled to bring a petition for the winding up of a company.

14. Taking into account the foregoing analysis, it seems that the company does not offer a serious challenge to the Petitioner being appointed as the Executor of the will in testament of Gianni Luigi Antoni who was a listed member of the company. I therefore find that the Petitioner has the locus standi to bring the instant Petition.

15. I now turn to the second limb of the preliminary objection is the Petitioners failure to comply with Rule 25 of the companies (winding up) Rules. The company urges that the non-compliance of the aforementioned rule renders the petition fatally defective and a nullity in law. Rule 25 of the Companies (Winding Up) Rules states as follows:

*“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.”*

16. I have examined the said affidavit filed contemporaneously with the Petition. Indeed the same was sworn three days prior to the presentation of the Petition which is clearly in breach of Rule 25. What effect does this have on the Petition? It was the Respondent’s assertion that this anomaly renders the Petition null and void ab initio and should therefore be struck out. In **PJ Dave Flowers Limited Winding Up Cause No. 16 of 2011** the court considered a matter where the verifying Affidavit was flawed, and held that;

*“...I see no prejudice that has been suffered by the Companies and I therefore refuse to strike out the Petition on that ground. I will however strike out the Verifying Affidavit and grant the Petitioner leave of 7 days to file compliant Verifying Affidavits”*

17. I also bear in mind the holding in the case of **Gulam and Another –vs- Jirongo (2004) 1KLR 158** where it was held that;

*“Unless procedural lapses have caused the adversary a prejudice which cannot be compensated with costs or there is a clear manifestation of an intention to overreach, the same should not be accorded fatal consequences”*

18. I am of the above persuasion. There has been no demonstration that the defective verifying affidavit has occasioned any kind of prejudice to the Company as it is presented. Further to this, when an affidavit is defective as such, the remedy is not strike out or dismiss the same as has been sought in this case.

19. By dint of Article 159 of the constitution, I find that striking out the Petition on the sole reason that the verifying affidavit fails to conform to Rule 25 will be placing undue regard to procedural technicalities. Essentially what the court is saying is that provided that there was no injustice or prejudice caused by any irregularity, the court has discretion to waive or even overlook such

- procedural irregularities.
20. In this case, the respondent did not demonstrate that it had suffered prejudice or injustice as a result of failure by the Petitioner to conform to Rule 25. I therefore dismiss the preliminary objection on this front.
21. On the issue that the Petition is an abuse of court process, I find that this cannot form a matter for consideration under a Preliminary Objection. Whether the Petition is an abuse of the court process and its merits thereof is a matter of evidence and should be gone into at the hearing of the substantive Application. For this reason and the reasons outlined earlier in this ruling, I find no merit in the preliminary objection dated 28<sup>th</sup> January, 2016 and subsequently dismiss it with costs to the Petitioner.
22. I shall now turn to the Petitioner's application for amendment. The law regarding amendments of pleadings is well settled in the case of **Eastern Bakery –vs- Castelino (1958) EA 461** wherein at page 462 the court held:-

*“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs ..... The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ..... or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ...*

*The main principle is that an amendment should not be allowed if it causes injustice to the other side.”*

23. Further in the Court of Appeal case of **Joseph Ochieng & 2 Others –vs- First National Bank of Chicago C.A. No. 149 of 1991**, Shah J.A ( as he then was) held:-

*“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.*

*These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our Order VI A Rule 3 sets out all such principles which have been gone into on many previous occasions.”*

24. The foregoing are therefore the principles that the courts apply when dealing with an application

such as the one under consideration. How do those principles apply to the application under consideration?

25. The main thrust of the Petitioner's application is that she seeks to cure an inadvertent omission, as she had failed to state that she was acting in the capacity of the Executor of Gianni Luigi Antoni. The main opposition to the application to amend by the Respondent Company is that the Petition is incurably defective and void ab initio.
26. The said argument was hinged on the fact that the Petitioner does not have locus standi to bring the instant Petition and that the same is an abuse of the court process. As the court has already rendered itself on these points, I find that the Respondent Company has not seriously challenged the application for amendment.
27. Further, I have looked at the annexed draft Petition and indeed all that is sought is the inclusion that she is an executor of Gian Luigi Antoni, a fact that has not been opposed by the Company. I am of the view therefore that the Respondent Company will in no way be prejudiced if the amendment sought is allowed.
28. For the foregoing reasons, I am satisfied that in order to wholly determine all the issues in dispute between the parties herein and for expeditious disposal of the dispute, it is just and proper that the amendment sought be granted. Accordingly, I will allow the application on the following terms:-
  - a. **The Petitioner is granted leave to amend her Petition and should file and serve the same within 14 days of the date hereof.**
  - b. **The Respondent Company is at liberty to file and serve its Reply to the Petition within 14 days of service.**
  - c. **The Petitioner to pay the Respondent the costs of this application.**
29. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 22<sup>nd</sup> day of April, 2016.**

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**C. KARIUKI**

**JUDGE**