



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
WINDING UP CAUSE NO 14 OF 2013
IN THE MATTER OF THE COMPANIES ACT
(CAP 486 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF WINDING UP OF KAMPALA COACH LIMITED

BETWEEN

NIJUD ABDALLAH MOHAMMED.....PETITIONER

AND

AHLAM ABDUL BASIET.....RESPONDENT

MOHAMMED ABDUL BASIET.....INTERESTED PARTY

DOUGLAS WEKHOMBA.....INTERIM LIQUIDATOR

RULING

INTRODUCTION

1. On 23rd August 2013, the Petitioner filed a Petition 22nd August 2013 which sought the following orders **THAT:-**

- a. **A Receiver be appointed by this honourable Court.**
- b. **A valuation be conducted to ascertain the net worth of the company.**
- c. **The Final Deed of Settlement be adopted in full or that in the alternative, all the Petitioner's shares be bought from Kampala Coaches Limited and that she ceases to be a director or shareholder of the said company.**
- d. **In the alternative and without prejudice to prayers (c) above the company be wound up by the Court under the provisions of the Companies Act (Cap 486) and the assets and liabilities be shared among the directors giving due regard to**

reasonable fairness and the doctrines of equity.

e. Or that such other or further relief may be made in the premises as the Court deems fit.

f. The costs of the petition to your Petitioner out of the assets of the company on priority.

2. On the same date, the Petitioner filed a Notice of Motion seeking appointment of Douglas Wekhomba as an Interim Liquidator pending the hearing and determination of the Petition herein. The court granted the said prayer on 28th March 2014 as the application was unopposed, the Respondent having failed to attend court on the said date after been served with a Hearing Notice to so attend.

3. On 2nd October 2013, M/S Soita & Saende Advocates filed a Notice of Appointment of even date on behalf of the Respondent therein. On 3rd November 2014, M/S J.N. Njuguna & Co Advocates filed a Notice of Intention to Appear on Petition, Notice of Appointment of Advocates and a Replying Affidavit in pursuance of powers and mandate vested in Mohammed Abdul Basiet (hereinafter referred to as “the Interested Party”), as an Attorney for both the Petitioner and the Respondent.

4. M/S Soita & Saende Advocates then filed the Respondent’s Notice of Motion application dated 17th October 2014. Thereafter M/S Khalwale & Co Advocates filed a Notice of Change of Advocates. The latter firm of advocates filed another Notice of Motion application dated 11th November 2014 on 12th November 2014 on behalf of the Respondent.

5. On 19th November 2014, the Respondent filed a Notice of Preliminary Objection dated 17th November 2014. M/S Anyegah & Co Advocates for the Interim Liquidator filed their Notice of Appointment dated 19th November 2014 on 21st November 2014. They subsequently filed a Notice of Motion application dated 5th December 2014 on 11th December 2014.

6. The Interested Party also filed a Notice of Motion application dated 16th December 2014 on 17th December 2014 in which he sought to have the orders appointing the Interim Liquidator stayed and set aside and the filing of Statement of Account in respect of the Company’s Account No 1121865631 Kenya Commercial Bank Moi Avenue Branch Nairobi with effect from 17th October 2014.

7. Parties filed their respective responses and written submissions in respect of the various applications. Following protestations of the appointment of the Douglas Wekhomba as the Company’s sole Interim Liquidator, on 11th February 2015, the court appointed Douglas Wekhomba and Edison O. Manyura who were agreed upon by the parties. The court directed that the two Interim Liquidators file monthly Joint Reports until further directions and/or orders by the court.

8. The court deemed it necessary to set out a brief chronology of the events herein to demonstrate the acrimonious nature of the matter herein. There were accusations, counter-accusations and lengthy submissions by the parties whenever they attended court. In view of the nature of the Preliminary Objection, it was agreed that the same would be dispensed with first.

9. The Ruling herein is therefore in respect of the Respondent’s Preliminary Objection in which he sought to have the entire Petition together with the Verifying Affidavit struck out for being defective for non-compliance with Rule 10 (sic).

10. All the parties’ advocates gave oral submissions. The Respondent’s Written Submissions

dated 16th December 2014 were filed on 6th January 2014. The Interested Party's Written Submissions were dated 16th January 2015 and filed on 19th January 2015 while those of the Petitioner were dated were dated 3rd February 2015 and 4th February 2015. The Interim Liquidator did not file any written submissions. However, in oral submissions by his advocate, he urged the court to take into account the provisions of Rules 10, 14 and 17 of the Companies (Winding Up) Rules.

LEGAL ANALYSIS

11. The Respondent referred the court to the provisions of Rule 10 of the Companies (Winding Up) Rules that provide as follows:-

“All orders, summons, petitions, warrants or other documents of any kind in any proceedings and certified copies thereof shall be sealed.”

12. She submitted that sealing of documents was not a procedural step but rather a very important step that could not be disregarded. She stated that since the documents were not sealed, the order of 28th March 2014 was an illegality and for which, the court could not abet and flout the law.

13. It was her submission that documents and pleadings must be sealed by the court to gain validity before they are either served upon the respondents or acted upon by the court. In this regard, he referred the court to the case of **WC No 30 of 2012 In the Matter of Winding Up of Bactlab Limited** (unreported) in which Mabeya J held that failure to seal a Petition as required by Rule 10 was fatal.

14. She also argued that the filing of the Affidavit Verifying the Petition on the same date the Petition was in contravention of Rule 25 of the Companies (Winding Up) Rules as it ought to have been filed within four (4) days after the petition is presented. It was her argument that the wording of the said Rule was in mandatory terms and consequently, urged the court to strike out the Petition herein.

15. The Interested Party also relied on the case of **WC No 30 of 2012 In the Matter of Winding Up of Bactlab Limited** (Supra) and supported the Respondent's submissions regarding Rules 10 and 25 of the Companies (Winding Up) Rules.

16. The Interested Party added that Rule 28 (2) of the Companies (Winding Up) Rules provided that no order shall be made in a petition that has not satisfied the requirement of Rule 28 (1) of the Companies (Winding Up) Rules and that failure to seal documents was a terrible and fatal omission that could not be excused by Rule 201 of the Companies (Winding Up) Rules.

17. On his part, the Petitioner submitted that he filed the Affidavit Verifying Petition dated 23rd August 2013 within the four (4) days that are envisaged in Rule 25 of the Companies (Winding Up) Rules. He said that the said Affidavit was filed on the same date and that failure to seal documents under Rule 10 of the Companies (Winding Up) Rules was curable under the provisions of Section 202 (1) of the Companies (Winding Up) Rules.

18. Rule 202 (1) of the said Rules provides as follows:-

“No proceedings under the Act or these Rules shall be invalid by reason of any defect or any irregularity, unless the court before which any objection is made to the proceedings is of the opinion that substantial justice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.”

19. Notably, the Respondent and the Interested Party did not demonstrate what substantial injustice or prejudice they had suffered merely because the Petition was not sealed. In fact, Rule

10 of the Companies (Winding Up) Rules, though drafted in mandatory terms, does not prescribe any penalty for the failure of sealing the Petition. If it was so critical, nothing would have been easier than for the drafters of the legislation to have specifically set out the consequences of such default.

20. There was no doubt in the mind of the court that failure to seal the Petition did not cause any substantial injustice or prejudice to the Respondent and the Interested Party. If it did, then the Respondent and the Interested Party failed to demonstrate the same to the satisfaction of the court.

21. The distinction between procedural and substantive technicalities is that in the former, no injustice or prejudice is suffered by a party to a proceeding while in the latter, no amount of an award of damages would be sufficient to compensate such a suffering party due to the injustice or prejudice that would have been occasioned to him.

22. In this regard, the court was in agreement with the holding in the case of **Zhao Xiao Hua vs Beijing Kenya Company Limited [2011] eKLR** in which Azangalala J (as he then was) stated as follows:-

“In rule 2 “sealed” means sealed with the seal of the Court. Having perused this application, I observe that it indeed does not have the seal of the court. So, is it, to that extent, incompetent? That in my view is a defect of form and not substance. It does not go to jurisdiction and has caused no prejudice to the petitioner. The failure to have the motion on notice does not therefore invalidate the same.”

23. As was also observed by Musinga J (as he then was) in the case of **In the Matter of Uniconsult (K) Limited [2012] eKLR** :-

“...If courts continue to accord procedural technicalities undue prominence in administration of justice they will be negating an important constitutional requirement...”

24. Indeed, if the court were to strictly apply the provisions of Rule 10 of the Companies (Winding Up) Rules, it would have had the effect of rendering the present Preliminary Objective fatally defective as the same was not sealed by the registrar as the said rule requires that **“other documents of any kind in any proceedings and certified copies thereof shall be sealed.”**

25. As was rightly pointed out by counsel for the Interim Liquidator, it is the duty of the registrar to seal, provide and deliver documents. It therefore follows that no party in any proceedings for winding up of companies should be penalised or suffer injustice due to omissions by the registrar to seal documents or to do any act.

26. The provisions of Section 202 (1) of the Companies Act and Article 159 (2) (d) of the Constitution of Kenya, 2010 were intentionally included in the law as saving clauses to prevent injustice that would be occasioned to parties. Infact the new constitutional dispensation frowns upon dismissal of matters on technicalities as that would be contrary to the obligation of court to develop law.

27. Having had due regard to the provisions of Section 202 (1) of the Companies Act and Article 159 (2) (d) of the Constitution, the court was more persuaded by the Petitioner’s submissions that failure by the registrar to seal the pleadings did not render the Petition defective and/or incompetent as it was a defect of form that did not go to the substance or root of the Petition.

28. It is for that reason that this court departed from the holding of Mabeya J **In the matter of Winding Up of Bactlab Limited** (Supra). Appreciably, the same was not binding on this court as it was delivered by a court of equal and concurrent jurisdiction as this one. It was therefore the finding and holding of this court that the Respondent’s and the Interested Party’s submissions that

the Petition was incompetent for want of sealing by the registrar could not be sustained as such failure did not invalidate the Petition or render it incompetent.

29. As regards Rule 25 of the Companies (Winding Up) Rules, the Petitioner espoused the correct position that the Affidavit Verifying Petition ought to be filed within four (4) days of presenting the Petition. The Affidavit Verifying Petition was filed on the same day when the Petition herein was presented and was therefore within the four (4) days that was envisaged in the said Rule. There is nothing in the Companies (Winding Up) Rules to suggest that the said Affidavit Verifying Petition had to be filed a day or four (4) days after the presentation the Petition, which is what the court understood the Respondent and Interested Party to be submitting.

30. Accordingly, having considered the Respondent's Preliminary Objection herein, the oral and written submissions and case law that was relied upon by the parties, the court came to the conclusion that the said Preliminary Objection did not remotely fall within what could constitute a preliminary objection.

31. In the case of case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696**, the Court of Appeal had the following to say about preliminary objections:-

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, 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.”

DISPOSITION

32. For the foregoing reasons, the court found that the Respondent's Preliminary Objection dated 17th November 2014 and filed on 19th November 2014 was not merited. In the circumstances, the same is hereby dismissed with costs to the Petitioner.

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2015

J. KAMAU

JUDGE