THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

WINDING UP CAUSE NO. 36 OF 2004

IN THE MATTER OF:

CEMPACK LIMITED

AND

In the Matter of:

THE COMPANIES ACT CHAPTER 486 OF THE LAWS OF KENYA

RULING

Enlargement of time to file affidavit in opposition

[1] I have before me the Company's Application dated 19th June 2014 seeking for:-

a) Enlargement of time to file its Affidavit in opposition of this Petition;

b) The annexed draft Affidavit sworn by one Tejwani Singh to be deemed as duly filed; and

c) Costs to be in the cause.

For purposes of this ruling, the Respondent Company on the main cause shall be referred to as the Applicant whereas the Petitioner shall be referred to as the Respondent.

The Applicant's gravamen

[2] This Petition for winding up the Company was filed on the 25th on November 2004 on alleged inability of the Company to pay a debt of Kshs. 38,609,497/85. M/s Oyatta & Associates Advocates had previously been instructed by the Company to handle correspondence coming from M/s Kaplan & Stratton Advocates for the Respondent. Subsequently, the said advocates for the Applicant filed a Notice of Appointment of Advocate on 21st December 2004. Upon reconciliation of accounts between the parties which was before the filing of the Petition herein, the Company made certain payments to the Respondent**.** But in spite of protestation by the Company based on the confirmation of part payment by the Company of the amount admittedly owed, the Respondent nonetheless proceeded to file this petition. Upon notification in the Daily Newspaper on 23rd December 2004, the Company filed an Application under certificate of urgency on 28th December

2004 for two orders, namely,

> ***a) The petition to be struck out; and***
>
> ***b) A temporary injunction to stop the Petitioner from further advertising the Petition on the local dailies and/or Kenya Gazette.***

The parties then engaged in negotiations with a view to settling the matter amicably. And by a consent letter dated 14th February 2005, the Petition became partially compromised as the Company made payments of Kshs. 10,464,465.37 through post- dated Cheques ending with one on 31st January 2013. But accounts needed to be reconciled again and Parties began negotiation thereto. During the time of these negotiations and consent thereto, the Company's Advocates inadvertently failed to file an Affidavit in opposition of the Petition. They annexed copies of correspondences and draft of the reply as exhibit "FN6" and "FN7". Parties did not notice the anomaly and continued to exchange correspondence, file documents, record consents, list of authorities, witnesses and take directions on how the disposal of the Petition.

[3] Based on the above facts, the Applicant argued that the court should consider this application with the aim of serving substantive justice as opposed to paying undue regard to procedural technicalities. That course of action will be perfectly in accordance with the principles of justice enshrined in Chapter Ten of the Constitution of Kenya 2010 and more specifically Article 159. (2) (d) which states:-

> ***"….In exercising judicial authority, the courts and tribunals shall be guided by the following principles_***

a. **….**
b. **….**
c. **….**
d. ***Justice shall be administered without undue regard to procedural technicalities; and…"***

They also cited the case law, for instance; **Co-operative Bank of Kenya ltd v Clement Thuku Ikigu [2005] eKLR** where **H.P.G Waweru J** allowed an Affidavit and deemed it to be duly filed. The judge stated as follows-

> ***"….be that as it may, it should be the aim of the court to do substantial justice to the parties, if possibly by hearing and determining on merit the issues between them placed before it, without allowing itself to be side-tracked by procedural issues. The affidavit is a substantial document to which are annexed various documents. It is already on the court record. It was indeed filed out of time. But that is not the same as saying that it should not have been filed at all. It is not an illegal document merely because it was filed late, and in the circumstances of this case it would not do justice to the parties to expunge it from the record, I hold that the right thing to do is to order that the replying affidavit be deemed to be duly filed. It is so ordered. "***

The Applicant stated that, despite the time lines for filing and serving affidavit set out in Rule 31 of the Company (Winding up) Rules, Cap 486, Rule 201 of Company (Winding up) Rules, Cap 486 provides for Enlargement or abridgment of such time, as it states:-

> ***"The court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding."***

On this see the case of **Re Shadows & Lights Ltd [1987] eKLR,** where **Shah, J,** faced with a similar application in a winding up Petition allowed an affidavit be filed out of time under Rule 201 of Company (Winding up) Rules, Cap 486 and said the following:-

> ***"…Under Rule 201 of the Companies (Winding Up) Rules Cap 486, the court has power to enlarge or abridge time. Rule 201 gives almost unfettered power to court (in a fit case) to enlarge time.***
>
> ***Exercising my discretion under Rule 201 aforesaid I enlarge the time for filing of the Affidavit so that it may be deemed to be filed already on the date it was filed……As a result of the company not complying with Rule 31 aforesaid a day of hearing was wasted. I order that costs thrown away and occasioned by the said non-confidence (namely a day's hearing and attendance to-day) be paid by the company to the petitioner within 28 days of taxation…"***

Other judicial authorities cited by the Applicant include; **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR, M. J. Anyara Emukule J** relied on Article 159(2)(d) of the Constitution of Kenya and the decision of **Ringera J. (as he then was) in Microsoft Corporation vs. Mitsumi Computer Garage Ltd & another [2001] KLR 470** when the learned judge held -

> ***"Deviation from or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those instances, the court should rise to its higher calling to do justice by saving the proceedings in issue."***

The Applicant averred that the affidavit to be filed contains important matters on accounts; disputed and admitted sums which will need to be resolved by the court during the hearing. The attached exhibits, i.e. correspondence between the parties indicate these disputes. The debt of Kshs. 38,609,497/85, is strongly disputed hence the Petition is an abuse of the court process. See the case of **Re African Safari Club ltd {2006] eKLR winding up cause 1 of 2005, D. K.** where **Maraga J** in dismissing the Petition as an abuse of the court process, had this to say;

> ***"…This, in my view, is an issue that cannot be resolved on affidavit evidence. The Petitioner's claim also that the Company has claimed VAT on the goods it supplied to the company as input tax requires a thorough examination of documents. Whether or not the paint alleged by SGS to have been substandard and has now faded away requiring the repainting of the hotel where it was used and whether or not the Company's alleged counterclaim of Sh. 26,000,000/= is well founded is also a matter that cannot be resolved on affidavit evidence, I am satisfied that these are seriously disputed issues that call for a full-fledged hearing. They are not matters for the Company court as it is not a forum for deciding disputed debts. See Cruisair Limited – Vs – CMC Aviation Limited (No 2) [1978] KLR 131"***

The Applicant is convinced that they will suffer irremediable injustice if the application is not granted. On this see **Re Kenya National Trading Corporation ltd [1997] eKLR winding up Cause 3 of 1996 Keiwua, J** stated that;

> ***"…I am therefore of the view that as there is no irremediable prejudice or injustice to be suffered by the petitioner the winding up order is set aside accordingly with costs to the petitioner in any event…"***

According to the Applicant, this petition is brought with the intention of unduly pressurizing a company into paying a debt which is clearly disputed, and ordinarily, courts strike out such Petition for being an abuse of the process of the court. **In the Matter of P.J Dave flowers limited [2011] eKLR A. Mabeya J** in dismissing a Petition being abuse of the court process was guided by **Re Mann –vs- Goldstein (1968) 2 ALL ER 769 at page 773,** where the Court held:-

> ***"…… (iii) Where the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court***

should, therefore ignore) and the company is solvent the court will restrain the prosecution of the Petition to wind up the company. As Sir Richard Melins V.C said in Cadiz Waterworks Co. –v-s Barnett, where solvency exists and the debt is disputed, the winding up proceedings herein are not proper remedy to be applied for such circumstances.

He further held:-

'It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and a disputed debt."

In view thereof, I am satisfied that the debt is properly disputed by the company…..Accordingly, I believe that the Petitions were brought with the intention of unduly pressurizing the companies into paying the debt which was clearly disputed. Accordingly, I am of the view that the Petition is an abuse of the process of the court."

Therefore, as the debt is clearly disputed, they urged the Court allow the application and enlarge time for them to file the affidavit in opposition to the Petition. The affidavit gives the factual situation of the debt allegedly owed before the petition was filed. In that manner, the court will be able to serve substantive justice in accordance with the Constitution. Written submissions on the main petition have been filed and rely on and address the negotiations and payments made herein. Therefore, the affidavit will not cause the Respondent any prejudice; instead, it will only assist the court determine the real issues in controversy. In any case, the Respondent will be compensated by an award of costs of the application.

Petitioner resisted enlargement of time

[4] The petitioner, Pan African Paper Mills (E.A) Limited (the petitioner) filed the present petition for winding up of Cempack Limited (the respondent) on 25th November, 2004. The petitioner notified the general public of the filing of the petition in the Daily Nation of 25th November, 2004. By an application that was in court on 28th December, 2004 the respondent sought to have the petition struck out. Since the filing of the application on 28th December, 2008, the respondent has not filed an affidavit in opposition to the petition. On 27th May, 2014, the petitioner filed its final submission in support to the winding up petition. These submissions were served upon the respondent's advocate on 29th May, 2014. In the final submissions, the petitioner pointed out the fact that despite advertisement and service of the petition, the respondent had not filed an affidavit in opposition to the petition. It only sought to have time enlarged for them to file an affidavit in opposition to the petition through the application dated 19th June, 2014 and filed in court on 20th June, 2014.

[5] In the application, the Applicant's advocate claims that the omission was due to inadvertence as they only discovered it when they were served with submissions. The Respondent raised the following salient points which they believed should form issues for determination:

a. Whether the Applicant can rely on the Civil Procedure Act and its Rules to apply for extension of time in these proceedings.
b. Whether the court should exercise discretion and enlarge time.
c. Whether the petitioner stands to suffer prejudice if the application is allowed.
d. Who should bear the costs of this application?

[6] According to the Respondent, the invocation of sections 1B, 3 and 3A of the Civil Procedure Act (Cap) 21 Laws of Kenya and Orders 50 and 51 of the Civil Procedure Rules, 2010 in the application is inappropriate. Such citing is oblivious of the fact that the power of the court to wind up companies is a special power conferred by law and the procedure is prescribed under the

Companies Act (Cap) 486 Laws of Kenya (the Act) and the Company (Winding Up) Rules (the Rules). On this see the case of **Re Rural Urban and Credit Finance Ltd, High Court Winding up Cause No. 31 of 1984** [unreported], where the Court held that winding up proceedings are governed by the Companies Act (Cap) 486 Laws of Kenya and the Companies (Winding Up) Rules and not by the Civil Procedure Rules (Cap) 21 Laws of Kenya and its Rules. Further, the Court in **Re Savannah Development Company High Court Winding Up Cause No. 5 of 1991** [unreported] has also stated the above in the following terms:

> ***"I agree with Mr. Gautama's submission that the Civil Procedure act and the Rules do not apply and cannot be invoked in a winding up petition which is governed by the provisions of the companies (winding up) Rules."***

Similarly, in **Mansion House Ltd vs John Sainsbury Bwillkinson [1954] EACA 21**, it was stated that the Civil Procedure Act and Rules do not affect any special jurisdiction or power conferred by any special form of procedure prescribed by any other law. The court in the case went on to state that:

> ***"One such law is the Companies Act which gives the court certain powers and duties quite remote from anything directly contemplated by the general provisions of the Civil Procedure Act. It is clear that from the reading of the Civil Procedure Act and the Companies Act that rules made under the Companies Act were introduced for purposes of winding up of companies, methods of procedure distinct from those prescribed by the Civil Procedure Act or Rules of court made thereunder."***

Therefore, the Respondent argued, the authorities cited by the Applicant and the Civil Procedure Act (Cap) 21 and the Civil Procedure Rules, 2010 do not apply and cannot be invoked in a winding up petition as done by the respondent. By reason of the above, the Respondent submitted that the application is fatally defective as it has been brought under the provisions of the Civil Procedure Act (Cap) 21 and the Civil Procedure Rules, 2010. The respondent's application for extension of time ought to fail on this ground alone.

[7] On whether the court should exercise discretion, the Respondent urged that the petition was served on the Respondent on 1st December, 2004 and an affidavit of service to the effect was filed in court on 17th December, 2014. By dint of Rule 31 of the Company (winding up) Rules, they were obligated to file an affidavit in opposition to the petition within seven days of service. It is worth noting that this provision is couched in mandatory terms. The Applicant failed to file its affidavit of opposition to the petition as required. The failure to file an affidavit in opposition to the petition is fatal and an application for enlargement of time cannot remedy the situation. They relied on the case of **Re Park Enterprises Ltd High Court Winding up Cause No 50 of 1993** [unreported**]** which held:-

> ***"The companies were served on January 18, 1994 and had up to January 25 to file affidavits in opposition required by Rule 31. These were not filed and the petitioner submits that the petitions are unchallenged and must succeed.***
>
> ***Those petitions being winding up causes No.1 and No .2 of 1994 for winding up Variety Traders Ltd and Afro Knit Ltd were presented in court on January 4. 1994 and the affidavits under Rule 25 were filed on January 6, 1994 and as the petitions were served on the companies on January 8, 1994 affidavits under Rule 31 ought to have been filed on January 25, 1994. These were not filed and the petitioner submits that the petitions are unchallenged and must succeed.***
>
> ***Instead, the companies say they opposed the petition by means of an application to stop advertisement of the petitions and supported by an affidavit setting out grounds of objection. The companies submission is like a submission made before Shah J . in Winding up Cause No. 24 of 1990 S . R. Vs. KARINDITU CANVAS***

MANUFACTURERS LTD which he quite properly rejected in my view. I quite agree with him that failure to file an affidavit under Rule 31 is like failing to file defence to a suit."

See also the case of **Raila Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others** [2013] eKLR, where the Supreme Court of Kenya stated that litigants have a duty to ensure they comply with their respective time-lines and the court must adhere to its own. The court went on to state that:

"There must be a fair and level playing field so that no party or the court loses the time that he/ she/ it is entitled to, and no extra burden should be imposed on any party, or the court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided."

The application should be refused on order to provide a fair and level playing field in this case, and also avoid imposing extra burden on the Respondent. The debt owed by the Applicant to the Respondent is the basis of and forced the filing of the petition. The debt has been outstanding for quite some time now. It has taken more than a decade for the Applicant to bring this application. The delay is inordinate and inexcusable. The delay does not warrant the exercise of this court's discretion. This court ought not to aid the indolent. The petitioner and the court should, therefore, not shoulder the consequences of omissions and inadvertencies on the part of the respondent's advocates.

[8] The Applicant's reliance on the overriding objective principle and the provisions of Article 159 of the Constitution to support its application is misplaced, for the overriding objective principle is about parties assisting the court to achieve a speedy, timely and cost saving disposal of cases before it. The indolence of the Applicant negates this principle. See **Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission [2013] eKLR**, where the Court of Appeal of Kenya that:

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and costs effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of the rules of procedure and to create an anarchical free-for-all in the administration of justice. This court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules."

The draft affidavit in opposition to the petition by one Tejwani Singh Sagoo does not even raise triable issues to warrant the exercise of the court's jurisdiction to extend time. It simply seeks to replicate what is set out in the witness statement filed by Mr. George Githuku Githua on behalf of the Applicant. Contrary to what has been set out in paragraphs 4, 5, 6 and 7 of the draft affidavit, the Applicant was placed under receivership in March 2012. The Applicant immediately moved to court and obtained an order staying the appointment of the receivers. This order was confirmed by the Court of Appeal in August 20012. The ruling of the Court of Appeal has been annexed to the draft affidavit. It is for this reason that the Respondent has been dealing directly with the Applicant in these proceedings. No evidence has been produced by the Applicant to show that the Respondent has been dealing with the receiver managers as alleged in the affidavit. The Applicant has been appearing in this petition in its own capacity and not through the receiver managers. Therefore, the allegation that the transactions carried out till the year 2008 were done by the receiver managers is therefore not true! The affidavit in opposition to the petition therefore has no merit; it will serve no useful purpose and is only intended to delay this matter further. Although this court has discretion to extend time, the discretion must however be exercised judiciously. Owing to the inordinate delay

and the fact that the affidavit raises no triable issues, the application is an abuse of the court process and it ought to be dismissed with costs.

[9] The Respondent continued to submit that, the reason given, i.e. its advocate inadvertently failed to file an affidavit on time is not a sufficient reason to warrant the grant of the orders sought. A solicitor has been held liable in negligence for faults committed in litigation. The Court in **Keterman v Hansel Properties Ltd [1988] 1 ALL ER 38**, stated that there will be cases in which justice of the case will be better served by allowing the consequences of advocates' negligence to fall on their heads**.** In **William Kilimo Kiptoo v Cheserek Kiptoo [2009] eKLR,** the court stated the following:

> ***"In my view, it is time our courts take a bold step and tell advocates who have been contributing to the delay in finalization of cases that enough is enough…In doing so, I am aware that the litigant has nothing to lose by reason of the fact that each advocate is now enjoined by practice and/or law to take up insurance cover to protect himself/herself against occupational hazards including but not limited to negligence.***

If indeed the Applicant's advocate is to blame, they will not suffer any prejudice if the application is dismissed as it has a remedy against the advocate in negligence for failing to file the affidavit. In any event, the duty to follow up the case to its logical conclusion lies squarely on the Applicant. They did not so act. Further, they do not stand to suffer any prejudice if the application is not allowed because it still has the right to address the court on legal issues arising in these proceedings. See the decision of the Court of Appeal in **Shah v Midco Holdings Limited [2002] 1 EA 204 (CAK)** which affirmed the position that a party who fails to file an affidavit in opposition to a winding up petition may address the court on points of law. Similar decision was made in **Kenya Cashewnuts Ltd v National Cereals & Produce Board [2002] 1 KLR.** On the other hand, the Respondent will suffer great prejudice if this application is allowed since it has been kept away from his monies for over 10 years and the Respondent should not be made to pay for the Applicant's mistakes. The Respondent is in receivership and the court ought to take judicial notice of the fact that the Respondent has a high turnaround of employees who would otherwise be witnesses owing to its status and is unlikely to have a fair trial without the full facts and evidence. These proceedings are at a very advanced stage in that the petition had been canvassed by way of written submissions prior to the filing of this application. Allowing the application would mean that petition will have to be heard afresh. This will cause further delays in the conclusion of these proceedings. The special nature of winding up proceedings requires that the proceedings be concluded expeditiously. It is for this reason that strict timelines are set out by Statute. This petition has been pending for over 10 years and delaying it further is prejudicial to the petitioner. Delay defeats justice. Litigation must come to an end. The Applicant should be granted leave to submit of points of law instead of re-opening the petition.

[10] The Respondent concluded that, the balance of convenience lies in favour of dismissing this application with costs to the Respondent. Costs follow the event. On this, see the decision by the Supreme Court in **Jasbir Sign Rai & 3 others v Tarclochan Signh Rai & 4 others [2014] eKLR** that costs are not used to penalize the losing party but for compensating the successful party for trouble taken in prosecuting a suit. Had the respondent filed its affidavit in opposition to the petition as stipulated in the rules, the petitioner would not have suffered the trouble of defending the instant application, which in the Respondent's view is unnecessary. Hence, the Court should award costs to the Respondent. In the unlikely event that this application is allowed, the Respondent prayed for thrown away costs in view of the fact that the application was filed as a result of the respondent's own fault. The application is an afterthought.

DETERMINATION

Issues

[11] The ultimate issue is; whether I should enlarge time and allow the Applicant to file an affidavit in opposition to this petition. If the answer is in the affirmative, accordingly, the other prayer that the draft affidavit be deemed as duly filed should be granted for it is a saddle upon the substantive order for enlargement of time. But to reach that decision, there are several strands of issues which have to be determined. Some are the core of the application whilst there are of preliminary significance yet with possible implications on the application. The preliminary issues are:

> ***a) Whether the Civil Procedure Rules apply in a proceeding for winding-up a company under the Companies Act; and***
>
> ***b) Whether this court has any discretion to enlarge time under the winding-up rules.***

I will determine these issues *in limine.*

Application of Civil Procedure Rules

[12] I should begin by saying that, much judicial ink has been spilt on this subject, but judicial precedent has already settled the issue well. I do not, therefore, wish to rehash the plethora of decisions thereto which are of great number, except to cite **Mansion House Ltd vs John Sainsbury Bwillkinson [1954] EACA 21**, because it formulated the principle as well as the policy behind the principle on *Application of Civil Procedure in a Winding-up Cause* in the following terms:-

> ***"One such law is the Companies Act which gives the court certain powers and duties quite remote from anything directly contemplated by the general provisions of the Civil Procedure Act. It is clear that from the reading of the Civil Procedure Act and the Companies Act that rules made under the Companies Act were introduced for purposes of winding up of companies, methods of procedure distinct from those prescribed by the Civil Procedure Act or Rules of court made thereunder."***

Of great worth, the Civil Procedure Act and Rules recognize in section 3 that any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other written law for the time being shall govern the subject arising from or under the special law. Therefore, the Companies (Winding up) Rules are a special code which should govern all proceedings made under the said Rules. Except, however, under rule 203 of the Companies (Winding up) Rules, where there is no provision made in the Rules of the Act on a particular situation, unless otherwise directed by the court, such other rules and practice of the court will apply.

[13] In this matter, there is a sufficient express provision in the Companies (Winding up) Rules on the procedure and form to be used in applying for the relief of enlargement of time. See especially rule 7(1) of the Companies (Winding up) Rules which provides that, an application in court other than a petition shall be made by way of motion with notice being served on the party to be affected by the order. To show completeness of this code of procedure, see also rule 7(2) on all applications which are specified that they should be made in chambers; the procedure is by way of summon in chambers. I do not see the reason why the Applicant chose to invoke the provisions of the Civil Procedure Rules instead of the specific clear and express provisions of the Companies (Winding up) Rules. Nevertheless, my understanding of the law is that, such lapses or commissions as citing the wrong procedural law are now be measured on a new yardstick; i.e. article 159 of the Constitution which encourages courts to take a much wider view of justice. And, in such case, the court should establish whether the defect is of form or substance by discerning whether thee procedural lapse;

> ***a) Affects the rights of the parties; or***
>
> ***b) Goes to the jurisdiction or substance of the matter; or***

c) Has caused or will cause substantial injustice; or

d) Is one which cannot be remedied by any order of the court?

If the procedural lapse does not fall within the broad categories set above, the court should treat it as a defect or irregularity of form and disregard it under the blessings of article 159 of the Constitution. The procedural lapse herein does not affect the rights of the parties at all and I would place it in the category which the Supreme Court in the case of S.K. Macharia referred to as *''technicalities which were depreciated by the article 159 of the Constitution''*. The point was technically upright, but it was oblivious of the dictates of substantive justice. Accordingly, I will determine the application on its merit rather than on the said technical point. I will now move on to decide on the application.

Does the court have discretion to extend time?

[14] Without much ado, I will resort to rule 201 of the Companies (Winding up) Rules, Cap 486 which provides for Enlargement or abridgment of time as follows:-

> ***"The court may, in any case in which it sees fit, extend or abridge the time appointed by these Rules or fixed by any order of the court for doing any act or taking any proceeding."***

Doubtless, the court has discretion to extend or abridge time specified by the Rules or fixed by the court for doing any act or taking of any proceeding. The time appointed under rule 31 of the Companies (Winding up) Rules for filing of an affidavit in opposition of the winding-up petition may be enlarged by the court as it deems fit. The exercise of discretion, must, however, be exercised judiciously and judicially; not capriciously; not whimsically. And judicious exercise of discretion is one exercised on defined legal principles and valid reasons. I will examine the application to see whether it fits this threshold.

Is enlargement of time merited herein?

[15] The Respondent argued that the application has been brought too late in the day. First, it has been made after over 10 years since the petition was filed; and second, it has been brought after the case has been canvassed through written submissions. According to the Respondent, the delay is inordinate and inexcusable; and allowing the application will only hurt them and the entire administration of justice. The application is contrary to the statutory obligation of parties to assist the court to attain the overriding objective of attaining expeditious, just, fair, proportionate and affordable disposal of the cases. The Respondent went on to submit that the reason given is not sufficient at all to warrant enlargement of time to file affidavit in opposition to petition. Indeed they suggested that, since counsel for the Applicant is to blame, the remedy for the Applicant is in damages against counsel for negligence. The Respondent also argued that, in any event, the affidavit does not raise any triable issue and should be rejected by the court. On this latter submission, let me state straight away that, in such applications the court is not really involved in interrogating the merit of the averments in the affidavit proposed to be filed, but rather whether a reasonable explanation for the delay has been given which would make the court excuse the delay and enlarge the time for filing it. The merit of the averments is the business of the trial court. Except, however, in considering the request for enlargement of time, the court must weigh the prejudice which will be visited upon the Respondent and the wider administration of justice in allowing the late filing of an affidavit in opposition to the petition. I will not forget that tether on discretion and I will proceed as such.

[16] The Applicant argued that the delay was inadvertent and counsel explained the circumstances which lead to the delay. He stated that, when parties were involved in negotiations on settlement of the matter, he did not remember to file the affidavit. He gave yet two other reasons why the affidavit should be allowed out of time; a) the affidavit will enable them to bring

forth their entire case for determination by the court; and b) the affidavit will not prejudice the Respondent to an extent which is not compensable in damages.

[17] As a general rule and this is a constitutional command, courts should favour the hearing of parties on merits of their respective cases rather than sending them away from the seat of judgment summarily. As such, an opportunity to be heard becomes an integral part of the right to fair hearing under article 50 of the Constitution. The opportunity to be heard includes an opportunity to a party bring forth their entire case for determination by the court. I so argue well aware of the fact that the Applicant would still have an opportunity to submit on issue of law even in the absence of the affidavit in opposition. But I will address this aspect later. However, I am not oblivious that justice should be dispensed without delay; this is also a principle of justice under article 159 of the Constitution and therefore, an integral part of administration of justice. Accordingly, prolonged delay which is not explained reasonably tinctures administration of justice. Such delay in law, is said to be inordinate, inexcusable and a source of prejudice to the Respondent. The question then becomes: Is the delay herein inordinate, inexcusable and therefore, a source of prejudice to the Respondent as well as the expeditious disposal of this case?

[18] I am cognizant of the fact that this case is an old one; but the delay herein has been occasioned by varied factors. I am also alive to the fact that submissions have been filed and allowing the affidavit herein to be filed belatedly may be tantamount to re-opening the case. Similarly, I am acutely aware that counsel for the Applicant has an obligation towards the client to act diligently on the business of the client, and should have known better about this fact. Except, however, whereas the client may have a remedy against the advocate, that fact should not be a bar for the court to evaluate the merits of the application for enlargement of time and make an independent and reasoned decision thereto. Again, it is desirable that courts should be wary to decimate a client's right because of mistake of counsel. In all these things, it should be noted that I have not forgotten that the Respondent has rights in this matter. Consequently, I find myself in a novel balancing act of competing rights of and opportunities to the parties. The new command throws me to consider that this is a winding-up petition, and is to be taken for what it is; an angel of death knocking at the door steps of a juristic person, the Company. If the petition succeeds the company will meet its death. These are real possibilities in a petition such as this. Now, in my evaluation, and without determining the merit or propriety thereof, the documents annexed to the affidavit relate to communication and payments between the parties on the matter in controversy in the petition. The negotiations have not been denied by the Respondent. I do not think, therefore, that the correspondences and the documents being introduced formally into these proceedings will cause any confusion in or convolute the matters in issue. They will simply enable the court to determine the real issue at hand and render a judgment on the winding-up of the company or otherwise. In the circumstances of the case the opportunity to speak to only legal issues may not be sufficient provision of fair hearing to the Applicant. For those reasons, I am inclined to enlarge time and allow the Applicant to file an affidavit in opposition of petition pursuant to rule 31 of the Companies (Winding up) Rules within such time as I shall designate below.

Orders

[19] Accordingly I make and give the following orders and directions, respectively:-

a. ***The Applicant shall file and serve the draft affidavit in opposition to petition within the next 7 days. Upon service with the duly filed affidavit in opposition of petition, the Respondent shall file an affidavit in reply within 3 days thereof.***
b. ***The Respondent shall file and serve composite submissions in respect of the entire petition taking into account the affidavit in opposition of petition filed pursuant to this ruling within 14 days of today.***
c. ***On service in (a) above, the Applicant shall file and serve composite submissions within 14 days thereof.***
d. ***The submissions which had been filed earlier on shall be returned to the respective parties. Parties will not pay further court fee on the submissions filed in accordance with this ruling***

unless there was an underassessment of the fee.

e. ***As this case is aged, these timelines are to be adhered to strictly lest the party at default will be taken to forfeit its right to file the documents ordered by the court. It is so ordered.***

Dated and signed at Nairobi this 15th day of May 2015.

F. GIKONYO

JUDGE

Delivered and signed in court at Nairobi this 20th day of May 2015.

E. OGOLA

JUDGE