



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**WINDING UP CAUSE NO. 3 OF 2014**  
**IN THE MATTER OF SECTION 2 OF THE COMPANIES ACT CHAPTER 486**  
**OF THE LAWS OF KENYA**

AND

**INTHE MATTER OF WINDING UP CAUSE UNDER SECTION 213, 218 AND 219 OF THE COMPANIES ACT**

AND

**IN THE MATTER OF KALOS LIMITED**

**(Under Sections 223 of the Company's Act Rules 21, 22, 23 and 27 of the Companies(Winding Up) Rules)**

**CHARLES NYORI KAGWE.....APPLICANT**

**VERSUS**

**KALOS LIMITED. ....PETITIONER**

**RULING**

1. By its Petition dated 10<sup>th</sup> September 2014 **KALOS LIMITED**, a Limited Liability Company, Incorporated in Kenya with Certificate of Incorporation No. **CPR/2013/104255** petitioned this court for a Winding Up order on the grounds that it is unable to pay its debts amounting to **KShs.18,023,738/=** owed to its creditors.
2. On the 17<sup>th</sup> September 2014, the court made an order that the petitioner do nominate a receiver/manager to be appointed in the event of orders for winding up of the company. When the matter came up in court on the 31<sup>st</sup> October 2014, the Petitioner intimated that it was negotiating with the receiver manager and sought time to complete negotiations and file a report on payments to the creditors.
3. On the 11<sup>th</sup> May 2015, one of the Creditors **Charles Nyori Kagwe** filed a Notice of Intention to Appear under **Rule 29 of the Companies (Winding Up) rules** and oppose the petition. Together with the Notice to Appear he filed an application by Notice of Motion brought **Section 223 of the Companies Act and Rules 21, 22, 23 and 27 of the Companies (Winding Up) rules**, seeking the following orders:

(1) .....Spent

(2) That this Honourable court be pleased to suspend and/or stay further proceedings pending the hearing of the application.

(3) That this Honourable court be pleased to strike out and/or dismiss the petition herein.

(4) That the court has discretion to allow the application.

4. The grounds upon which the application is brought are that the petition was not advertised and gazetted within the period stipulated under the rules, that it was not presented to the Registrar of Companies and that the mandatory procedure provided under the Companies (Winding Up) rules was not followed.

The Applicant in his affidavit sworn on the 11<sup>th</sup> May 2015 and filed on even date stated that the company owes him a sum of **KShs.2,084,000/=** in unpaid supply of cereals he exhibited unpaid and dishonoured cheques, and that his interests as a creditor would therefore be prejudiced if the petition is allowed, and the petitioner wound up.

5. The Petitioner though served failed to file its response to the Application.

In her submissions, Ms. Mukira Advocate for the Applicant urged that the petition is fatally defective as the mandatory procedure provided by the Companies (Winding Up) rules were not followed.

She relied on a letter dated 8<sup>th</sup> May 2015 from the Registrar of Companies offices, Nakuru, stating that there is non-compliance with the requirements of the Official Receiver of the Republic of Kenya, whereupon then, the procedure was not followed. This court has considered the petition, all documents as filed and the application. The Companies (Winding Up) rules provide for the procedure and formats before and after filing of a petition for winding up of a limited liability company.

**Rule 22** is very explicit on the procedure. There is no evidence that the petition was ever presented before the Registrar of Companies for directions on advertisement to be given and mandatory payments made nor Gazettement of the petition. Indeed, the letter from the Registrars offices confirms that none of the above was done. On the above grounds, the petition ought to be struck out for being incompetent.

6. The petition was filed on the 10<sup>th</sup> September 2014, and sought an order for the winding up of the company by the court.

Under **Section 226(2) of the Company's Act**, proceedings are deemed to have commenced at the time of the presentation of the petition, and that an interim liquidator should have been appointed by the court. In this instant case, the petitioner moved to court on the 17<sup>th</sup> September 2014 and the court directed the petitioner to nominate an interim Official Receiver who would ordinarily have the duty to protect the petitioners interests and those of the creditors.

**Under Rule 22 of the Companies (Winding Up) Rules**, it is the court that ought to have appointed the liquidator and not the company.

In the case in **Re Clive Private Safaris Limited (1996) e KLR**, the liquidator was appointed by the company. The court found that to be irregular as it would ordinarily protect the interests of the company to the prejudice of the creditors.

7. It is evident from the Record that the petition is fatally defective due to procedural failures – which are substantive and which defects go into the root of the competence of the petition.

The petition, for instance, was not advertised. How then would the creditors who may wish to oppose or support the petition know that the company intends to wind up its operations due to insolvency?. It would cause prejudice and injustice and would be deceitful to the creditors should they one day discover that the company was wound up without their knowledge.

8. Due to the defects and apparent irregularities, among them confirmed by the office of the Registrar of Companies, as stated above, it would be in the interest of justice to strike out the petition with costs to the Applicant.

It is so ordered.

**Dated, signed and delivered in open court this 30<sup>th</sup> day of July 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Ms. Mukira - for the applicant

Court clerk - Linah.