REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 44 OF 2010

IN THE MATTER OF THE COMPANIES ACT,

(CAP 486 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF WINDING UP OF KAM PHARMACY Limited

R U L I N G

1. The application for the determination of this Court is brought pursuant to **Section 221** of the *Companies Act* and **Rules 23 and 28** of the *Companies (Winding Up) Rules*. The applicant, in its application dated 24th June, 2011, seeks for orders from this Court, to strike out and/or dismiss the Petition filed on 29th November, 2010. The application is predicated upon the grounds that the Petition is misconceived, that it does not disclose a cause of action, that the advertisements for the Petition are invalid and not compliant with the provisions of **Section 23** of the *Companies (Winding Up) Rules*, it is an abuse of the process of the Court and does not comply with the provision of **Section 28 (1)** of the *Companies (Winding Up) Rules*.
2. In the supporting affidavit by **Khatoon Madatally Rahemtulla** sworn on 24th June, 2011, the deponent avers and reiterates the grounds as set out in the application, that the Petition is misconceived and an abuse of the process of the Court. He further contends that the Petitioners did not comply with **Section 28 (1)** of the *Companies (Winding Up) Rules* and that the contents of the Petition have not been verified as required by the law.
3. In the Replying Affidavit of **Noorali Ebrahim Mavani** sworn on 28th June, 2011 in opposition to the application, the deponent avers that the advertisement of the Petition in the Kenya Gazette was done in accordance with **Section 23** of the *Companies (Winding Up) Rules*. It is contended that the Petition is well founded, with the requisite *locus* and compliant in accordance with **Rule 25** of the *Companies (Winding Up) Rules*. Further, the deponent avers that the unreasonableness of the Respondents in relation to the Petition to amicably resolve the dispute brought the remedy of the Petition into play as provided by the law.
4. The Petitioner presented his Petition dated 22nd November, 2010. The Petition, as highlighted at paragraph 22, is brought pursuant to the default in complying with the legal requirements under **Section 219 (b) and (f)**, as read together with **Section 221 (1) (ii)** of the *Companies Act*. The Petitioner further claims that the affairs of the Company were conducted in a manner oppressive to him, and that there were several instances of fraud as set out in paragraphs 11-26 of the Petition. The Petitioner further claims that the Company is in serious breach of express and mandatory provisions of the Companies Act and the only just and equitable remedy would be for the Company to be wound up. In his submissions dated 19th June, 2013, the Petitioner contends that

the Applicant has failed to prove that the Petition does not disclose a cause of action or that the Petition is misconceived and an abuse of the process of the Court. It is submitted that irregularities, if any, are curable under **Order 19 Rule 1** and *Article 159(2)* of the Constitution, and relied on **Steven Kariuki v George Mike Wanjohi & Others (2013) eKLR** to further buttress this argument. The Petitioners submits that he complied with **Section 25** of the *Companies (Winding Up) Rules* by having the contents of the Petition verified by the Registrar and the slight anomaly in the affidavits attached thereto, would not be sufficient reason to disregard the Petition as a whole. In submitting on this issue, the Petitioner relied on **Devji Meghji & Brother Ltd v Prospectus Thika Ltd & 2 Others (2005) eKLR**, and further by reiterating that the Applicant's affidavits do not conform to the provisions of **Rule 10** and *Schedule 3* of the *Oaths and Statutory Declarations Act.* He also made reference to **Section 72** of the Interpretation & General Provisions Act. He also relied on **Hui Chi-Ming v R [1992] 1 A.C 34** and **Regina v Telford Justices, *ex parte* Badhan 2 Q.B 78**.

5. On his part, the Applicant submitted that the Petition, in accordance with **Section 219 (b) and (f)** as read with **Section 221 (1) (i) and (ii)**, could only be presented as stipulated therein. The Applicant submitted that the Petitioner was not, and is not, a shareholder, or a contributory, a creditor or a prospective creditor, necessary to have the requisite *locus* to present the Petition. In this regard, he relied upon the case of **Re Kentazuga Hardware (2005) 2 KLR 381** and **Re Garnets Mining Co. Ltd (1976-80) KLR 999.** He submitted that the Petition was misconceived, did not disclose any cause of action as the affidavit did not comply with **Rule 25** of the *Companies (Winding Up) Rules*. Further, the Applicant submitted that the claims were time barred, having been brought after a long time, basing his arguments on the case of **Murri v Murri (1999) 1 E.A 212**. As regards **Rule 25**, the Applicant submitted that the Petitioner's affidavit was not in compliance with the aforementioned rule, and therefore invalidated the Petition. This was in following the decision of Emukule, J in **In Re Mode 1996 Security (2005) I KLR 583**. He submitted that the Petition was also not in compliance with **Rule 28 (1)** of the *Companies (Winding Up) Rules* and as such no order could be issued by the Court in accordance with **Rule 28 (2)**. He also relied upon **Mitha Mohamed v Mitha Ibrahim (1967) E.A 575, Re Modern Retreading Co. [1962] E.A 57, Ebrahim v Westbourne Gallaries Ltd (1973) AC 376** and **In Re the Matter of Madhupapaper International Ltd [2006] eKLR** on whether it would be just and equitable to wind up the company.
6. From the fore going, three issues arise for the determination of the Court:

> "**(1) whether the Petitioner has the requisite *locus* to present the Petition;**
>
> **(2) whether the Petition was properly presented in accordance with the requirements under the Companies (Winding Up) Rules;** and
>
> **(3) whether the Court may act as under Section 219(f) to wind up the Company".**

The Petitioner contends that he derives his *locus* from **Section 219 (b) and (f)**, as read with **Section 221 (1) (ii)** of the *Companies Act*. The Petitioner also contends at paragraph 5 of the Petition that he was instrumental in the setting up and incorporation of the Company. At paragraphs 2 and 19 of the Replying Affidavit and in his submissions respectively, the Petitioner avers that he is a shareholder of the Company, and thus satisfies the requisite locus in presenting the Petition. He argues therefore, that as a shareholder, he is entitled pursuant to **Section 221 (1) (ii)**, to present the Petition as such. The said Section reads;

"A winding up petition shall not, if the ground of the petition is default in delivery of the statutory report to the registrar or in holding the statutory meeting, be presented by any person except a shareholder, nor before the expiration of fourteen days after the last day on which the meeting ought to have been held".

In contrast, the applicant contends that the Petitioner is not a shareholder, contributory, creditor nor prospective creditor to have had *locus* to present the Petition. He relies on **Section 221 (1)** of the Act which reads inter alia:

"An application to the Court for the winding up of the Company shall be by a petition presented, subject to the provisions of this Section, either by the Company or by any creditor or creditor (including contingent, or prospective creditor or creditors), contributory or contributories, or by all or any of those parties together or separately".

The Applicant at paragraph 2 of his submissions categorically states that the Petitioner does not satisfy these mandatory requirements as read with **Section 221 (1)**. He argues that in the Petition, particularly at paragraph 5 thereof, the Petitioner stated that he was ***"instrumental in setting up and incorporating the company"***. He avers that this statement should not be construed to mean that the Petitioner was therefore a contributory as per **Section 221 (1)** as read with **Section 221 (1) (i) (a) and (b)** and thus had *locus* to present the Petition.

7. According to Black's Law Dictionary, Ninth Edition at page 378, a contributory is deemed to mean;

"One who contributes or has a duty to contribute. (Also) **A person who, as a result of being or representing a past or present member of a corporation, is liable to contribute to the corporation's debt upon its winding up".**

In Re Garnets Mining Co. Ltd (supra) at 1008, Kneller, J (as he then was) referred to **Re Expanded Plugs [1966] 1 All E.R 877** and determined that;

"There was, from the onset, a requirement that a contributory petitioner must show that there will remain, when the company's debts and liabilities have been met, some tangible, sufficient interest for division among the shareholders if a winding up order were made or else it would be a farce to wind it up on his petition since he would have no interest in such an operation as he is a paid up shareholder."

From the foregoing, for the Petitioner to be considered a contributory, he would have to have made tangible contributions or was duty bound to contribute to the company. He would have to establish an interest in the winding up of the company, and what monetary distribution he would receive or expect to receive as a shareholder of the company. The Petitioner contends, however, that the Petition was presented pursuant to **Section 221 (1) (ii)** by him as a shareholder of the company. However, under **Section 221 (1) (b)**, the contributory has to establish that he had shares that were allotted to him or held by him, and registered in his name, for at least six months during the eighteen months before the commencement of the winding up. The Petitioner contends that the Company was incorporated on 27th January, 1967 with a share capital of Kshs. 200,000/- divided into 2000 shares of Kshs. 100/- each. He further contends that he had, or has, a shareholding of 100 shares as at the time of incorporation. At paragraph 2 of his Petition, the Petitioner avers that the file was missing at the Company's Registry. The veracity of his information as regards his shareholding could not, therefore, be verified. However, he has failed to annex to the Affidavit in support of the Petition, any evidence by way of share certificate or otherwise of his alleged shareholding in the Company. As such, the averments made are merely speculative, with no probative value, given that no documents verifying the same have been filed by the Petitioner. The onus would be on the Petitioner, as reiterated in **Re Garnets Mining Co. Ltd** (supra) and pursuant to the provisions of **Section 221 (1)** and **221 (1) (ii)** of the Act, to establish his contribution or shareholding in the Company that he seeks to have wound up.

8. **Rule 23** of the *Companies (Winding Up) Rules* reads as follows;

***"Except where the court gives leave to advertise before service, every petition shall be advertised not less than seven days after service on the company and at least seven days before the hearing* as follows-**

a. **once in the Gazette, and once at least in one newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of the company is or was situate, and in such other or additional newspaper as is directed by the court; and**

b. **such advertisement shall *state the date on which the petition was presented and the name and address of the petitioner and of his advocate*, and shall contain a note at the foot thereof stating that any person who intends to appear on the hearing of the petition, either to oppose or support it, must send notice of his intention to the petitioner, or to his advocate, within the time and manner prescribed by rule 29, and an advertisement of a petition for the winding up of a company by the court which does not contain such a note shall be deemed to be invalid:**

Provided that, if the petitioner, or his advocate, *does not within the time prescribed by these Rules, or within such extended time as the registrar may allow, duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard shall be cancelled by the registrar and the file shall be closed* unless a judge or the registrar shall otherwise direct". (Emphasis mine).

For an advertisement under the said Rule, it is clear that certain conditions have to be fulfilled by the Petitioner. It is mandatory that the Petition should not be advertised less than seven (7) days after service or seven (7) days before date of hearing, that the location, or last known address of the company should be included in the advertisement together with the name of the Petitioner and his advocate. **Rule 23 (b)** states that the advertisement shall be cancelled if it does not abide by the Rule as set therein. In his submissions, the applicant submits that the Petitioner failed to comply with **Rule 23** and as such the advertisement was therefore invalid. Emukule, J in **Re Mode 1996 Security** (supra) reiterated as follows:

"In the result therefore, I must uphold the preliminary objection and find that the petitioner's non-compliance with the applicable and mandatory provisions of rule 25 of the Companies (Winding Up) Rules is fatal to the Petition and the same is struck out."

Rule 23, as is **Rule 25**, is couched in mandatory terms. The Petitioner has to abide by its provisions, failure to which the sanction is enforced, pursuant to **Rule 23 (b)**. By failing to comply with **Rule 23**, the sanction as prescribed under **Rule 23 (b)** is, and should be enforced, the only exception being in instances where the Registrar or the Court intervenes. The Petition was served on 9th December, 2010, with the Notice issued on 29th November, 2010. The Petition was advertised in the Kenya Gazette and a daily newspaper with country wide circulation as per **Rule 23 (a)** on 17th December, 2010 and 22nd December, 2010 respectively. The hearing date of the Petition was 14th January, 2011. As a result, the Petitioner did meet the requirements as stipulated under **Rule 23** of the *Companies (Winding Up) Rules* and as prescribed Forms 6 and 7. The Applicant's contention at paragraph 10 in his submissions that the address of the Petitioner's advocate is not stated does not mount up. In the annexures attached to the affidavit of the applicant sworn on 24th June, 2011, it is clearly shown that annexures "A" and "B" comply with the provisions of **Rule 23** and are in the prescribed form i.e. Forms 6 and 7 respectively. The Petitioner, therefore, is deemed to have complied with the provisions of **Rule 23** of the *Companies (Winding Up) Rules*.

9. The Applicant further contends that the Petitioner did not comply with **Rule 25** of the *Companies (Winding Up) Rules*. The Rule reads:

"*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".

The Petition was filed on 29th November, 2010 and the verifying affidavit on3rd December, 2010 within the stipulated four (4) days and as prescribed in Form 10. The Court on 14th December, 2012 directed that the Petitioner file a Further Affidavit within thirty (30) days of the date of the hearing.

The Petitioner filed his Further Affidavit sworn on 2nd March, 2012 on 5th March, 2012. He was therefore, in compliance with the provisions of **Rule 25**. Further, the application was not brought pursuant to **Rule 25** of the *Companies (Winding Up) Rules* and the Applicant can't therefore be allowed to litigate on an issue that was not contemplated in his application or affidavit in support thereof. Nonetheless, the Petitioner has shown that indeed he did abide by the provisions of **Rule 25**.

10. **Rule 28 (1)** of the *Companies (Winding Up) Rules* provides that the Petitioner shall attend before the Registrar to satisfy him that the Petition has been presented and filed in the prescribed manner. It goes on further to state that the Registrar will satisfy himself that the Petition is in compliance with the Rules. At **sub-rule (2)**, the sanction imposed is that an Order may be made by the Court if **sub-rule (1)** is not complied with. The Petitioner contends that **Rule 28 (1)** does not provide a period within which the Petitioner should attend before the Registrar. It only states that the attendance shall be after the Petition has been presented. Further, he contends that the attendance is at the discretion of the Registrar, as he is the one mandated in appointing the date. The Petitioner went further and fixed the Petition to be heard on 14th January, 2011 before compliance with **Rule 28 (1)**. This, the Applicant avers, was not in compliance with the Rule and the Petition should thus be dismissed. **Rule 28 (2)** however states that no Order may be made on the Petition if **Rule 28 (1)** has not been complied with.
11. From the foregoing, it is evident that this is a matter that has taken long to resolve, having been commenced in December, 2010. The delay in its resolution is attributable to both parties adjourning the matter and seeking alternative recourse. This is evident in the numerous occasions that the Petition has come up for hearing, only for the parties to seek time to settle the same out of Court. Mutava, J on 14th February, 2012 reiterated as follow:

"Having heard submission by counsel for all the parties, it is apparent that there have been efforts to resolve the dispute out of court but which effort now seems not to be bearing any fruit. In the circumstances and in the interests of justice that the Petitioner be accorded an opportunity to put forth all the material it wishes to rely on in the Petition ….."

This Court is also cognizant of the fact that the parties did try engaging in discussions aimed at ameliorating the issues between them, only to fail at arriving at an amicable and acceptable resolution. *Article 159 (2)* of *the Constitution* as read together with **Section 1A** and **1B** of the *Civil Procedure Act*, empowers the Court to act in manner that would determine matters justly, efficiently and expeditiously, without any delay and undue regard to technicalities. **Rule 28 (2)** of the *Companies (Winding Up) Rules* is a mandatory provision, from which the Court may not deviate. Any party seeking the Court's discretion in the determination of such matters, should be seen also to be acting in accordance with the same Rules of procedure that he/she/it is bound by. The Court's discretion will not be exercised capriciously to exonerate a party that does not abide by those Rules. The Courts hands are tied, in that sense, and it would only exercise its discretion in the interest of justice and in upholding the rule of law. Accordingly, I find that the Petitioner was not invited to attend before the Registrar as is stipulated under **Rule 28(2)** but still went ahead to fix the matter for hearing on 14th January, 2011. **Section 1A (c)** of the *Civil Procedure Act* provides that:

> **"A party to civil proceedings or an advocate for such a party *is under a duty to assist the Court to further the overriding objective of the Act* and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court".** (Emphasis mine).

It is the duty of the parties in this matter, to assist the Court in achieving the overriding objective espoused under **Section 1B** of the *Civil Procedure Act*. For the Petitioner (or his appointed advocate) to contend that he was not invited to attend before the Registrar for a period of now over three (3) years, would indicate that he was either not keen at prosecuting his Petition and thus indolent or for any other reason, sat on his laurels and failed to adhere with the provisions of **Rule 28 (1)**. It would have been prudent and an exercise of temerity for the expeditious determination of this matter for the Petitioner to have brought to the attention of the Deputy Registrar the obligation of ensuring compliance with **Rule 28 (1)** before embarking on fixing the matter for hearing. As **Rule 28 (2)**

provides that no Order may be made on the Petition without the Petitioner first having complied with **Rule 28 (1)**, the Court is duty bound to adhere to that provision of the law. As the Court can make no Order, the Petition can neither be struck out nor enforced as prayed by the Petitioner. In the circumstance, therefore, the application dated 24th June, 2011 is hereby dismissed. In furtherance of the Court's obligation under **Sections 1A, 1B** of the *Civil Procedure Act* and *Article 159 (2)* of the *Constitution*, the Petitioner is directed to seek out the Deputy Registrar so as to attend before him/her to ensure compliance with **Rule 28 (1)** of the *Companies (Winding Up) Rules*. Costs will be in the cause.

DATED and delivered at Nairobi this 24th day of March, 2014.

J. B. HAVELOCK

JUDGE