

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO.15 OF 2012

IN THE MATTER OF UFANISI CAPITAL AND CREDIT LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CHAPTER 486 OF LAWS OF KENYA

RULING

Striking out petition

[1] The Motion before me is dated 10th December, 2012, and is seeking the court to strike out and dismiss the Petition dated 9th July, 2012 with costs of the application and petition to the Applicant. The Motion is expressed to be brought under Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules, and Rule 7(1) of the Winding-Up Rules. But the relief sought is fashioned 'to strike out and dismiss the petition' which presents some legal arguments, albeit at conceptual level only; but I should think it is still profitable to state that striking out a suit, is neither synonymous with dismissal of a suit nor results to dismissal of a suit. The two are distinct judicial acts and reliefs, and may not be used together as a single relief. Nonetheless, the anomaly does not cause any obscurities in understanding the purport and substance of the application before me as such. I will proceed to determine its merits.

[2] M/S Ng'ania in her characteristic brief but concise prowess ably argued the application on 19.3.14 after the court was satisfied that Notice for the Hearing of the application had been served on the Petitioners. The affidavit of service sworn by the process server, Mr JULIUS MUTIA MUTHOKA on 31st day of January, 2014 and filed in court bore out that fact. M/S Ng'ania submitted that the petition in question was filed on the basis of indebtedness by the company to the Petitioners in the sum of Kshs. 7,369,250 being the decretal sum arising out of the judgment of the court in NBI HCCC NO 877 OF 2010. That judgment was subsequently set aside on 5th October, 2012 by the order of the court. In the circumstances, the petition lacks a foot on which to stand and should be struck out for being scandalous, frivolous, vexatious, and an abuse of process of court.

COURT'S DECISION

[3] Every suit must have a legal foot on which to stand; it must be shown that a cause of action or a justiciable issue exists on which the court should exercise jurisdiction. The petition herein is filed as a winding-up cause under the Companies Act and it seeks the winding-up of a company on the basis of indebtedness by the company to the petitioners in the sum of Kshs. 7,369,250; being the decretal sum arising out of the judgment of the court in NBI HCCC NO 877 OF 2010. That judgment was subsequently set aside on 5th October, 2012 by the order of the court. Although an appeal was preferred on the ruling that set aside the judgment, the pendency of the appeal alone does not change the situation that; in law there is no judgment against the company in the sum of Kshs. 7,369,250. More so, the ruling which set aside the judgment in question has not also been stayed. Therefore, for all purposes, the moment the judgment which constituted the indebtedness by the company was set aside, the substratum or basis of the petition was blown off; the petition was left empty and void; lifeless in law. By that happening, the

company is no longer indebted to the petitioners, and cannot, in any sense, be said to be unable to pay its debts as envisaged in section 219(1) (e) of the Companies Act. Accordingly, the petition as it stands now is unsupported in law; serves no purpose under the Companies Act; is not a cause or a petition for winding-up of a company as such; is offensive and a nuisance to the process of the court. Absolutely nothing in the proceeding that could prevent a summary rejection of the petition as prayed for by the Applicant. Ultimately, to legally decimate the petition, I hereby strike out the petition. The upshot is that the application is allowed. I do not, however, consider the petition to be scandalous as it had been argued by M/S Ng'ania because the petition had been pursuant to the law and on a verifiable basis at the time. For that reason I will not make any order on costs against the Respondents.

[4] I should be grateful to counsel herein who provided the court copious and relevant judicial authorities as well as literally work on striking out of pleadings.

Dated, signed and delivered in open court at Nairobi this 21st day of May, 2014

F. GIKONYO

JUDGE