



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Winding Up Cause 30 of 2012

IN THE MATTER OF WINDING UP OF BACTLAB LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT CAP 486 OF THE LAWS OF KENYA

RULING

1. The Motion before me is the one dated 11th December, 2013 brought under Order 40 Rule 4(2) (3) (7) and Rule 25 of the Companies Act (sic). It seeks orders that the exparte order of injunction granted herein on 13th November, 2012 be discharged and that the Petition be dismissed for non-compliance with Rule 25 of the Companies Act (sic).
2. The grounds for the application were set out in the body of the motion as well as the Supporting Affidavit of Sofia Asali sworn on 13th December, 2012. The Applicant submitted that the exparte injunction issued on 13th November, 2012 was for 14 days, the matter was for hearing inter partes on 22nd November, 2012 but could not proceed because of late service, that the order although made on 13th November, 2012 was served upon the applicant on 20th November, 2012 outside the three (3) days allowed, that the order therefore expired on 08th December, 2012 but had been wrongly extended generally on 22nd November, 2012. That in the premises there was no order in force.
3. On the efficacy of the Petition, the Applicant submitted that Rule 25 of the Companies (Winding up) Rules requires that the Affidavit verifying the Petition should be sworn and filed within four (4) days of the filing of the Petition, that in the instant case, the Verifying Affidavit was sworn on 9th November, 2012 which was clearly four (4) days before the filing of the Petition. Mr. Mahan, learned Counsel for the Applicant relied on the case of **Re-Sheela Supermarket Ltd (2004) 2EA 264** in support of these submissions.
4. The Petitioner filed a Replying Affidavit sworn on 18th December, 2012 and also relied on the Supporting Affidavit to the motion dated 12th November, 2012. Mr. Misati, learned Counsel for the Petitioner submitted that the orders of injunction were properly in place. That since the orders were obtained under Order 41 Rule 1, Sections 1A, 1B and 3A of the Civil Procedure Act and Rules 3 and 7(1) of the Companies (Winding-up) Rules, Rule 3(3) of Order 40 of the Civil Procedure Rules was not applicable. That the Affidavit of Service of Alex Kimeu filed on 22nd November, 2012 clearly showed that the orders of 13th November, 2012 were served on 16th November, 2012. That those orders were

extended on 22nd November, 2012, that the two (2) Respondents who were not directors of the company were siphoning monies out of the company, that they were leading the company into liability to the detriment of the Petitioner who was a 50% shareholder, that there are serious issues raised in the Petitioner's original application and the current motion was only meant to ruin the Petitioner's investment.

5. On the Verifying Affidavit Mr. Misati was of the view that since the Verifying Affidavit was filed on the same day as the Petition, it was deemed to have been filed within four (4) days in terms of Rule 25 of the Companies (Winding Up) Rules. Mr. Misati however, did not address the court on the requirement that such a Verifying Affidavit is to be sworn within four (4) days after the filing of the Petition. Counsel urged that the motion be dismissed.

6. I have carefully considered the Affidavits on record and submissions of Counsel. I have also perused the record in detail. The first issue regarding the efficacy of the injunctive order made on 13th November, 2012 and extended on 22nd November, 2012 is easily disposable. That order was given *ex parte* on 13th November, 2012 for reasons recorded. The same was for 14 days. On 22nd November, 2012 when the matter came up for *inter partes* hearing, Mr. Dagama Rose who appeared for the company is shown to have applied for adjournment to enable him put in a Replying Affidavit. He also indicated that he had no objection to the extension of the orders then in force. Mr. Misati is recorded to have informed the court that the Petitioner had already served the documents and did not object to the adjournment sought. The injunction was therefore extended to the next hearing date.

7. On the foregoing facts, can it lie in the mouth of the Applicant that the order had been irregularly extended? I do not think so. The Counsel who appeared for the company on 22nd November, 2012 had clearly indicated that he did not object to the extension of the order. The Respondents caused the adjournment and they cannot turn around and use the adjournment to the prejudice of the Petitioner. I have also seen the Affidavit of Service of Alex M. Kimeu sworn on 21st November, 2012 and filed on 22nd November, 2012. It clearly shows that the documents in this case together with the order of 13th November, 2012 were served upon the Applicant herein on 16th November, 2012 at the offices of the company. The Respondents were served but they declined to sign in acknowledgment. This fact was not challenged or denied by the applicant in her Affidavit in Support. She only indicated in paragraph 5 that the order was served upon her on 20th November, 2012. In my view, having not denied the process server's positive averments as to the date of service I do not believe her. It should be noted that the process server's Affidavit of Service was sworn on 21st and filed on 22nd November, 2012 long before the current motion was filed. I will reject this ground of the motion.

8. The other issue is the Verifying Affidavit. The Applicant submitted that since it was sworn and filed in contravention of Rule 25 of the Companies (Winding up) rules, the Petition was fatally defective and should be dismissed. The Petitioner submitted otherwise. I have seen the Verifying Affidavit of the Petitioner. The same was sworn on 9th November, 2012 and filed on the same date as the Petition, on 13th November, 2012.

9. Rule 25 of the Companies (Winding up) Rules provides:-

“25. Every Petition shall be verified by an affidavit, which shall be sworn and filed 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.” (Emphasis mine)

The rule is clear. It requires that the Verifying Affidavit be sworn and filed within four days after the Petition has been filed. Form 11 of the forms in the schedule does specify what such an Affidavit should contain. The rule is in mandatory terms, failure to comply therewith, in my view, is fatal. The purpose of swearing and filing the Affidavit after the Petition has been filed is to ensure that the Petitioner has seen

the contents of the Petition which he should then verify. Obviously in the present case, although the Petitioner must have seen the Petition at the time of swearing, the same had not yet been filed and sealed by the court in terms of Rule 10 of the Companies (Winding-up) Rules. In this regard, that Verifying Affidavit had clearly fallen foul of Rule 25 of the Companies (winding up) Rules.

10. In the case of **In the Matter of Onecell Tracking Ltd W.U Cause No.41 of 2010 (UR)**, I held that when such an Affidavit is defective as such, the remedy is not to strike out or dismiss the Petition as is sought herein but to strike out the Verifying Affidavit and give leave to the Petitioner to file a compliant Verifying Affidavit. My view was informed by the provisions of Article 159(2) (d) of the Constitution in that, no prejudice whatsoever is suffered by the other party if the court takes that course. To strike out the Petition will ordinarily lead to increased costs and delay in dispute settlement which the current jurisprudence seems to frown at. I am of the same view in this case although the Applicant seems to have applied for the dismissal of the petition.

11. This should have settled this matter. However, when I perused the Petition on record to verify on the date of the execution, and consequent filing of the Verifying Affidavit, I noticed that the Petition was not sealed as required under Rule 10 of the Companies (Winding-up) Rules. Indeed I have already found that the Verifying Affidavit was sworn and filed before the Petition had been filed and sealed. Failure to seal a Petition as required by Rule 10 aforesaid is fatal. **In the Matter of Igi Holdings Ltd W.U Cause no. 9 of 2011 (UR)** I held as follows:-

“The other issue is the lack of sealing of the Petition. I have perused the Petition dated 10th May, 2011 and amended on 1st July, 2011. The same does not appear to have been sealed in terms of Rule 10 of the winding up rules. In my view, the purpose of having the documents set out in Rule 10 including the Petition, sealed is to have them authenticated as having emanated from the company court. This is so because of the serious nature of the winding up proceedings. Parliament in its wisdom, required that all the documents under that rule be sealed by the seal of the court. A document under rule 10 may have very serious repercussions on a company once served. It can seriously prejudice a company not only in its operations but also in its dealings with other entities in the World of Commerce. That is why in my view, Parliament required all those documents to obtain authentication of having the same sealed by the seal of the court. By having them sealed by the Court, they are validated to be serious business and are then to be acted upon.

Being of that view, I hold that the sealing of the documents under Rule 10 is not just a procedural step in the Winding up proceedings but a very important step in a winding up proceedings that cannot be disregarded. The documents and/or pleadings must be sealed by the court to gain validity before they are either served upon the respondents or acted upon by the court. A failure to have the document sealed in my view is a terrible and fatal omission that cannot be excused under Rule 202. This is because in my view by sealing, the court authenticates the documents that the same can be acted on. I do not agree with the Petitioners that this is a technical objection. I also do not agree that the Petition can be sealed later after the court has been called upon to act and adjudicate on the interlocutory applications filed subsequent to the filing of the Petition. The Petition should be sealed before it is served upon the Respondent or before the Court is called upon to act on it.”

12. I am still of the same persuasion. The Petition herein was not sealed. The court was called upon and it acted on it on 13th November, 2012 and issued certain orders. Since a court of law cannot aid and abet the flouting of the law once the same has been brought to its attention or has become apparent to it, I cannot ignore this fact. I say so because, this fact was not raised by the Respondents. The court has raised it because it noticed the same when it was considering the issue of non-compliance with Rule 25 of the Companies (Winding up) Rules as raised by the Respondent.

13. Accordingly, I have come to the inescapable conclusion that the Petition is for striking out, which I hereby do. Since I have struck out the Petition for non-compliance with Rule 10 of the Companies (Winding-up) Rules which the applicant had not raised, I will make no order as to costs both on the motion dated 11th December, 2013 and the Petition.

14. Consequently all orders that have been subsisting are hereby set aside.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 19th day of March, 2013.

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A. MABEYA
JUDGE