



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
WINDING UP CAUSE 18 OF 2007

IN THE MATTER OF UNICONSULT (KENYA) LIMITED
AND

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

RULING

1. The company filed an application dated 1st December, 2010 seeking an order to strike out the petition dated 20th November, 2007 and filed on 21st November, 2007. The application was grounded on the following reasons:

“1. The petitioner failed to comply with rule 25 of the Companies (Winding Up) Rules in that the verifying affidavit was supposed to be sworn and filed within four days after the petition was presented. Instead the verifying affidavit was sworn before the petition was signed or filed and the two documents were presented simultaneously in contravention of the said provision. Non-compliance with the said rule on the part of the petitioner renders the petition incurable and fatally defective.

2. The petition was not sealed as required by rule 10 of the Companies (Winding Up) Rules. The said omission renders the petition incurably and fatally defective.

3. In the premises the petition is frivolous, vexatious and an abuse of the process of the court.”

2. The application was supported by an affidavit sworn by **John Mbau Mburu**, the Company’s Advocate which is basically a rehash of the above grounds.

3. The application was opposed by the petitioner who filed grounds of opposition dated 10th February, 2011. The petitioner stated, *inter alia*, that:

1. The verifying affidavit was dispensed with on 11th November, 2009 when the court gave directions that the hearing of the petition was to proceed by way of viva voce evidence owing to the complexity and contentious nature of the matter.

2. Rule 25 of the Companies (Winding Up) Rules provides that such verifying affidavit shall be prima facie evidence of the contents of the petition.

3. The application has been brought in bad faith as the petitioner is in the middle of giving viva voce evidence.

4. The non-sealing of the petition and the simultaneous filing of the petition and the verifying affidavit have caused no prejudice/injustice to the company.

5. The application contravenes Article 159 (2) (b) (d) and (e) of the Constitution of Kenya, 2010.

6. The application contravenes rule 202 (1) of the Companies (Winding Up) Rules.

7. The application contravenes the provisions of order 19 rule 9 and 8 of the Civil Procedure Rules, 2010.

4. The petitioner also filed a replying affidavit sworn by **Anastacia Wangechi Mbau**.

5. The application was supported by **Engineers Eustace K. Mutea and Joseph Kirumba, “Interested Parties”**, who, together with the company, filed a notice of preliminary objection raising the same grounds as contained in the application.

6. This petition, including various applications, have been heard by a number of judges since 2007. After several applications the hearing of the petition commenced before Koome, J. (as she then was), on 7th July, 2010. The petitioner testified at length but did not complete her testimony. The hearing of the petition was adjourned to 7th October, 2010 but at as that date the trial judge had been transferred. Since then the matter has been mentioned severally before a number of judges.

7. Following the filing of the company’s application, counsel for the parties were directed to file their respective submissions which they did. Counsel did not wish to argue the application or highlight the submissions but urged the court to peruse their submissions and deliver a ruling on the basis of the same. I have carefully perused the applications, the affidavits and submissions filed by all the parties.

8. It is not in dispute that both the petition and the verifying affidavit are dated 20th November, 2007 and were simultaneously filed on 21st November, 2007.

9. Rule 25 of the Companies (Winding Up) Rules states as follows:

“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.”

10. In support of ground 1 of the company’s application, Mr. Mburu cited several authorities among them **In The Matter of Sheila Supermarket Limited, Winding Up Cause No. 54 Of 2000**, where Azangalala, J. struck out a petition which had failed to comply with the provisions of Rule 25 of the **Companies (Winding Up) Rules**. The ruling was delivered on 23rd June, 2004. **In The Matter of Mode 1996 Security Limited, Winding Up Cause No. 22 Of 2004**, Emukule, J. similarly struck out a petition for failing to comply with the same rule. The ruling was delivered on 4th May, 2005.

11. Responding to ground 1 of the company’s application, **Mr. Riunga Raiji**, for the petitioner submitted that the ground and indeed the entire application was brought in bad faith and with the sole intention of delaying, stalling or completely scuttling the hearing of the petition which had already commenced. He

pointed out that there had been similar previous attempts by the opposing parties to disrupt the hearing of the petition. Further, he cited orders made by the court on 14th December, 2011 which firmly dealt with the hearing of a materially similar preliminary objection dated 30th September, 2010.

12. Regarding the alleged defect in the verifying affidavit being filed simultaneously with the petition, Mr. Raiji submitted that the defect is curable by an appropriate order of this court made *suo moto* or on application by the petitioner.

13. He further cited the provisions of **Order 2 rule 14** of the **Civil Procedure Rules** which expressly forbids the raising of any technical objections on want of form of any pleading, and allows the court in appropriate cases in the interests of justice, to accept any sworn affidavit notwithstanding any technical and formal defects. That position is tenable to this court by virtue of **Rule 203** of the **Companies (Winding Up) Rules** which expressly sanctions the court to adopt practices, procedures and regulations of the court to fill gaps to address situations not ably provided for in the rules.

14. Further, counsel submitted that the object of a statutory verifying affidavit is to constitute *prima facie* evidence on the contents of the petition.

15. Regarding the non-sealing of the petition, Mr. Raiji submitted that it is also a technical issue that does not render the petition incurably defective as alleged by the company. In his view, the petition was appropriately sealed by the Deputy Registrar of this court who placed his stamp on page 15 of the petition and appropriately authenticated the same by his signature.

16. Counsel further referred to **Rule 202 (1)** of the **Companies (Winding Up) Rules** which provides that:

“No proceedings under the Act or these Rules shall be invalid by reason of any formal defect or any irregularity, unless the court before which any objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.”

17. Lastly, Mr. Raiji submitted that by virtue of the provisions of **Articles 159 (2) (b), (d) and (e)** of the **Constitution of Kenya, 2010** and **Sections 1A and 1B** of the **Civil Procedure Act**, the court is mandated to administer justice without undue regard to procedural technicalities. He therefore urged the court to dismiss the company’s application with costs.

18. I have carefully considered all the submissions on record. The objections raised by the company regarding the petition are technical in nature. It must be realized that in the new constitutional dispensation that started after 27th August, 2010 when the **Constitution of Kenya, 2010** was promulgated, courts are no longer shackled by procedural technicalities in dispensation of justice, particularly where the technicalities or procedural issues do not go to the root of the matter in issue or occasion substantial injustice or prejudice to any of the parties in a dispute. Courts today are required to ensure that substantial justice is administered without undue regard to such technicalities.

19. The provisions of **Article 159 (2) (d)** of the **Constitution of Kenya, 2010** are very important in this regard. The inclusion of such a provision was very deliberate and I believe it was informed by public outcry regarding serious injustices that were occasioned to litigants due to the judiciary’s rigid observance of procedural technicalities. **Article 159 (1)** states that judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution, and I may add, in accordance with the provisions of the Constitution. If courts continue to accord procedural technicalities undue prominence in administration of justice they will be negating an important constitutional requirement.

20. All the authorities that were cited by the applicant were decided before promulgation of the **Constitution of Kenya, 2010** which brought in a different dimension in administration of justice in so far as reliance on procedural technicalities is concerned. The authorities are therefore distinguishable on that basis.

21. The hearing of the petition has already commenced and it would occasion injustice if the court were to accede to the company's application to strike out the petition at this stage.

22. The court is not satisfied that the defects or irregularities referred to by the company will occasion any injustice to the company and the interested parties. Consequently, the application dated 1st December, 2010 is dismissed with costs to the petitioner.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE, 2012.

D. MUSINGA
JUDGE

In the presence of:

Muriithi – Court Clerk

Mr. Rambo for Mr. Mburu for the Applicant/Company

Mr. Rachuonyo for Mr. Raiji for the Petitioner/Respondent

Miss Nyawira for Mr. Ibrahim for the Interested Party