REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

WINDING UP CAUSE 1 OF 2006

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

BETWEEN

ALEX NGABU MUTHUI

(Petitioning as the administrator of the estates of the late

SAMUEL MUTHUI and ANNA MUTHONI MUTHUI)……...........…………..…..PETITIONER

VERSUS

HIGHLANDS INN LIMITED……………………....……..…………………1ST RESPONDENT

ESTHER MUTHONI……………………..………………………………2ND RESPONDENT

RULING

By a Preliminary Objection dated 18th January 2007 and filed in court on 19th January 2007, the 2nd Respondent is seeking an order that the Petition filed herein and application dated 24.7.2006 be struck out with costs on the following grounds:

(1) That the Petition is incompetent and bad in law.

(2) That the Petitioner has no *locus standi* to commence the cause.

The objection was directed at affidavit sworn on 5th July 2006. Mr. Kiarie for the Respondent submitted that the mode and process of winding up a company is clear. The Companies Act has laid down rules that are mandatory. He argued that the affidavit was sworn before presentation of the Petition. It is his contention that the affidavit could not possibly and competently verify the contents of the Petition. Mr. Kairie told the Court that the Petition is incompetent because it failed to satisfy the mandatory requirements of Companies Winding up Rules, more particularly Rule 25. Rule of the Companies (Winding Up) Rules says:-

"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."

Mr. Kiarie further submitted that the verifying affidavit sworn by the company has no reference to the authority to swear the affidavit by the Company.

Counsel relied upon the decision in the **Winding Up case No. 22 of 2004, Mode 1996 security** in which Justice Emukule said that-

"The reference in the above definitions of the word "after" is to "a point of time". In the context of the phrase – "shall be sworn and filed within four days after the Petition is presented" must mean that the Affidavit in support of the Petition must follow in time to the presentation of filing of the Petition. This means that the Statutory affidavit cannot, not only be sworn on the same day the Petition is presented, or filed, but the swearing and filing thereof must also follow in time to the presentation of the Petition.

So an Affidavit in support of a Petition sworn before presentation of the Petition is ineffectual and must be re-sworn before an order can be made on the Petition".

Mr. Gicheru for the Petitioner opposed the Preliminary Objection and reiterated that the defect can be remedied. His contention is that any reason to the strike out should be based on irregularity on an affidavit, and the party making such application must show that substantial injustice will be occasioned. It is his submission that the Respondent has not demonstrated nor claimed injustice.

Mr. Gicheru further argued that mere irregularity cannot cause injustice to the Respondent. He reiterated that the Petitioner has satisfied Rule 25 by filing the Affidavit within 4 days from the date of filing the Petition. He told the court that the alleged defect is not fatal and is curable.

He referred the court to the decision in the case of **Microsoft Corporation v Mitsumi Computer Garage [2002] 2 EA 460** and asked the Court to exercise its discretion to make appropriate order under Rule 201. He reiterated that the affidavit should not be rejected because it was sworn before the date was filed.

The contention is that any Petitioner who intends to kill a company must follow the rules. The Verifying Affidavit was sworn before the Petition was filed in contravention of the mandatory provisions of Rule 25. Much reliance was placed in the case of **In Re Standard Ltd Ex parte Tricom Paper International BV [2002] 2 KLR**, where Ringera J (as he then was) held that:

"The Petition was not under the seal of the company and its verifying affidavit contravene rule 25 of the Winding up Rules Form No. 11 in that the deponent did not disclose whether he was a Director or Secretary of the Company or that he had the authority of the company to make the affidavit.

The failure to comply with rules 10 and 25 in the Petition were not curable irregularities. The capacity and authority of the deponent to make the affidavit must be disclosed on oath in the affidavit itself and not in any other document or by any other means. The Petition herein was incurably defective and would be struck out".

The provisions of Rule 25 are specific. It provides for the time for filing of verifying affidavit in relation to the filing of the Petition. However, striking out pleadings is a draconian action and in the best interest of justice, the court should endeavor to order remedy for any defects in the Petition. It is my humble opinion that the Petition should not invalidated if it can be rectified by another order of this court as provided under Rule 202 (1), which provides:

"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".

For the reasons stated in the above, I order that the Petitioner re-swear and file the Verifying Affidavit. The application to strike out the Petition is declined. Costs in the Petition.

Dated AND signed at Nairobi on this 22nd day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 19th DAy of SEPTEMBER 2012.

F. AZANGALALA

Judge

In the presence of : Mr. Cheluget holding brief for Mr. Kiarie for Petitioner

Mr. Kiplimo for the Respondents.