



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Winding Up Cause 28 of 2011

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

AND

IN THE MATTER OF BEHILL INVESTMENT LIMITED

RULING

1. This is an application by the Company (“the Applicant”) seeking the striking out of the petition to wind it up dated and filed on 26th September 2011 by Pesatransact Limited (“the Petitioner”). The Motion is brought under Rules 7, 21 and 25 of the Companies (Winding Up) Rules. The grounds upon which the application is predicated on are set out in the body of the motion and in the supporting Affidavit sworn by Beth Nduta Osodo on 7th December, 2011.

2. In brief, it is the Applicant’s contention that the Petition does not conform to the requirements of Rule 21 of the Winding Up Rules as read together with Statutory Form No. 4 and that further, the affidavit verifying the petition is incurably defective and does not show the place where it is sworn and the date when it was sworn. Counsel for the Applicant submitted that Rule 21 of the Companies (Winding Up) Rules, is coached in mandatory terms. A Petitioner seeking to Wind Up a company must adopt either Form No. 3, or 4 or 5 with such Variations as circumstances may require. It was also pointed out that the Petition relates to a disputed debt between the Applicant and Respondent. In such a case, the Petitioner is required to use Form Number 4, but in the present circumstance the form used is Form Number 3. It is the contention of the Applicant that one cannot depart from matters provided in the said forms. As such, the inclusion of the contents of the Statutory Notice in the petition, whose format is not provided for, does not meet the necessities of Rule 21. The Applicant also raised the fact that the Verifying Affidavit filed contemporaneous with the Petition was defective as it had not indicated where and when it was sworn. It was contended that this was in breach of the provisions of Section 5 of the Oaths and Statutory Declarations Act.

3. In opposition, the Petitioner filed a Replying Affidavit of Peter Njeru sworn on 25th January, 2012 written submissions filed on 6th September, 2012 and a bundle of authorities filed on 25th January, 2012. It is the contention of the Petitioner that it is fully compliant with Rule 21 of the Companies (Winding Up) Rules. It was argued that Rule 21 of the Winding Up Rules provides for variation of the statutory forms as circumstances may require. That the Statutory form number 4 allows a Petitioner to set out the facts upon which the Petitioner relies. In the circumstances the reproduction, under paragraph 6 of the petition which includes the statutory notice served upon the Applicant prior to the filing of the petition, is proper and that further the Company’s submissions to the contrary should be disregarded by the Court.

4. It was also the submission of learned Counsel for the Petitioner that the Court's role is one of delivering justice to the parties on merit without undue regard to technicalities as provided for by article 159 of the Constitution. That further, the Court ought to be guided by the provisions of Order 19 rule 7 of the Civil Procedure Rules which provide that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect or irregularity in the form thereof or on any technicality. Counsel cited the case of **HEZLON KAMAU WAITHAKA –Vs- REGISTRATION OF ACCOUNTANTS BOARD CIVIL APPEAL NO. 407 OF 2004** in support of this proposition. It was further submitted for the petitioner that the Court has the discretion not to strike out a petition that is accompanied by a defective affidavit. The Petitioner relied on the case of **Gulam & Another –vs- Jirongo (2004) 1 KLR 158** in support of this argument. Counsel urged that the Court should exercise its discretion and allow the Petitioner to regularize its pleadings by filing a fresh affidavit and to thereby disallow the Company's application.

5. I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities relied on. There are two issues to be determined with regard to this Application. First, non-compliance of the Petition with Rule 21 of the Companies (Winding-up) Rules as read together with Form Number 4 of the forms and whether such non-compliance is fatal to the Petition. The second issue is whether the Affidavit verifying the contents of the Petition is defective and the effect thereof.

6. I propose to start with the issue of non-compliance with Rule 21 of the Companies (Winding-up) Rules. The rule provides:-

“21. Every petition shall be in Form No. 3, 4 or 5 with such variations as circumstances may require.”

The provision is couched in mandatory terms. So what form should a petition take? Form No. 3 is the general form for a petition, Form No. 4 is for a petition by an unpaid creditor for a simple contract whilst Form No. 5 is for a petition by a minority shareholder. The form taken by the Petitioner is Form No. 4, with certain variations. The Company however takes issue with the Petitioner's Petition with regard to paragraph number 6, which essentially replicates the contents of the statutory notice sent to the Company on 6th December 2010. It is contended that this particular variation offends the provisions of Rule 21. I agree with the Company, that a Petition has to be drafted in a Particular form that is, either in accordance to Form No. 3, 4 or 5. But there is a rider to this particular aspect, that is, the forms have to be varied according to the particular context to which it is presented. I therefore agree with the Petitioner, that the law allows variation on the aforementioned forms to enable a Petitioner set out the facts that it is relying on. The Petition sufficiently outlines the happening of a series of events that gave rise to a particular claim and as such, I find nothing wrong with paragraph 6 to show that it has offended Rule 21 of the Winding Up (Companies) Rules. In any event, it has not been shown that the petition as presented has caused any prejudice to the Company. Further, at this time of our development, the Court ought to have regard to substance rather than form as justice between the parties has to be done without going into the exactitudes of mere technicalities. I therefore reject the companies contention on this ground.

7. This brings me to the second issue of contention, that the Verifying Affidavit filed contemporaneous with the Petition was defective as it had not indicated where and when it was sworn. It was contended that this was in breach of the provision of Section 5 of the Oaths and Statutory Declarations Act Sections 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya provides that the Commissioner for oaths must indicate in the jurat the place and date when the Affidavit was sworn . I have examined the said affidavit. It is indeed true that it has not indicated where and when it was sworn. Since the same is clearly in breach of Section 5 of the Oaths and Statutory Declarations Act, what effect does it have on the Petition? Counsel for the Petitioner urged me to heed to Article 159 of the Constitution of Kenya whilst Counsel for the Company argued that Article 159 of the Constitution of Kenya is not a panacea to proceedings and processes which are incompetent and in breach of Rules of Procedure. In **PJ Dave Flowers Limited Winding Up Cause No. 16 of 2011** I considered a matter where the verifying Affidavit was flawed, I held that:-

“...I see no prejudice that has been suffered by the Companies and I therefore refuse to strike out the Petition on that ground. I will however strike out the Verifying Affidavit and grant the Petitioner leave

of 7 days to file compliant Verifying Affidavits”

I also bear in mind the holding in the case of **Gulam and Another –vs- Jirongo (2004) 1KLR 158** where it was held that:-

“Unless procedural lapses have caused the adversary a prejudice which cannot be compensated with costs or there is a clear manifestation of an intention to overreach, the same should not be accorded fatal consequences”

I am of the above persuasion. There has been no demonstration that the defective verifying affidavit has occasioned any kind of prejudice to the Company. I shall therefore not allow the prayer to strike out the Petition on this basis. I will however strike out the Verifying Affidavit and give the Petitioner leave of 7 days from the date of this Ruling to file a proper and compliant Verifying Affidavit in support of its Petition.

8. Given the above, I find that the Company’s Application dated 7th December 2011 fails. Costs shall be in the cause. Orders accordingly.

DATED and **Delivered** at Nairobi this 19th day of December, 2012.

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A. MABEYA
JUDGE