



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 16 of 2009
IN THE MATTER OF THE COMPANIES ACT (CAP. 486) LAWS OF KENYA
AND
IN THE MATTER OF CHAKAMA RANCHING COMPANY LIMITED
AND IN THE MATTER OF PETITION BY FRANCIS MWANZIA MULWA
RULING

1. The proceedings in this matter related to a Winding Up Petition by **Francis Mwanzia Mulwa** seeking to wind up the Company called **Chakama Ranching Company Limited**. The Directors of Chakama Ranching Company, led by Joseph Kasena Yeri and Ezekiel Karisa Kitso appointed the firm of **Nyamu & Nyamu Co. Advocates** to represent the company in the winding up proceedings. On 28th September 2009 the firm **Madzayo Mrima & Co. Advocates** filed a notice of appointment. The same firm also filed a notice on 7th November 2009 to appear for the 18 contributories in the company during the hearing of the petition.

2. On 10th November 2009 **M/s Nyamu & Nyamu Co. Advocates** filed a Notice of Motion under the provisions of **Sections 3 and 3A** of the **Civil Procedure Act** seeking to have the notice of appointment filed by the firm of **Madzayo Mrima & Co. Advocate** expunged from the records of the court. This application is premised on the grounds that the duly elected and registered directors of the company instructed the firm of **Nyamu & Nyamu Co. Advocates** on 14th July 2009. The company has already filed an affidavit in opposition and reply to the petition. The firm of **Madzayo & Murima Advocates** has purported to file a parallel notice of appointment to act for the contributories which is an abuse of the court process and should be expunged from the records.

3. These grounds are elaborated further by the affidavit of **Joseph Kasena Yeri** who claims to be the director and Chairman of the Company. He contends that the company held a meeting and with the firm of **Nyamu & Nyamu Co. Advocates** was appointed to defend the company in the winding up cause. He also contends that the persons who purported to instruct the firm of **Madzayo & Co. Advocates** are strangers to the Company; they are not registered as directors of the company by the Registrar of Companies. He attached copies of a letter by the Registrar of Companies dated 27th August 2008 that shows the following as the directors:

Thomas Karisa
Ezekiel Karisa
Harithi Ali Nassor
David Kahindi Kalume
Joseph Kasena Yeri

Thus it was submitted the persons who purportedly appointed the firm **Madzayo and Mrima Advocates** had no capacity to do so, they are mere strangers.

4. This application was vehemently opposed by Mr. Kithi on behalf of the firm of **Madzayo Mrima & Co. Advocates**. It was submitted that they were duly appointed to appear for the contributories to the company. The directors of the company have no capacity to represent the company in winding up proceedings. Immediately the petition was filed, all the directors stood suspended from office. They

had no power to appoint an advocate to represent the directors. Similarly, the y cannot transact the business of the company as it was held in the case of **Queensway Trustees Ltd vs. Official Receiver & Liquidator Tanneries of Kenya Ltd [1983] eKLR** the Court of Appeal posited:

“1. A winding up by the court dates from the date of presentation of the petition, and the directors are dismissed from then on, and have no powers to act on behalf of the company, any charge executed and registered by the directors afterwards is void *ab initio*

2. When a receiver manager is appointed out of court, the management and control of the company’s assets are taken out of the hands of the directors. At this stage the corporate structure may remain for purposes of; discharging the usual statutory duties; to deal with assets not covered by the security under which the receiver is appointed and property held by the company in trust for third parties”.

5. The holding by the Court of Appeal supports the contention that Mr. Nyamu has no authority to act for the company as he was appointed by directors who were no longer in office. The application was also challenged because it was brought by way of a notice of motion under the provisions of the **Civil Procedure Act** which cannot be invoked under the company law. The winding up rules provide the procedure to be followed and the Civil Procedure Act and Rules do not apply in winding up petition. **Under Rule 31 of the Winding Up Rules**, anybody who alleges a right is entitled to be heard in the petition. Mr. Ngome for the official Receiver submitted that under the **provisions of Rule 29 and 31 of the Winding Up Rules**, non of the two firms have complied in the provisions.

6. This application raises the twin issues of legal representation of the company and contributors by the two firms of advocates, the issue of the competency of their notices of appointments and the competency of the application to strike the firm of Madzyo Mrima & Co. Advocates from record as advocates for the Company. It is trite that winding up petitions are governed by the Companies Act and Winding Up rules provide for the procedure to be followed. I have no difficult to agree with the submission by the counsel for the respondent that the Civil Procedure Act and Rules do not apply in winding up petitions. The Companies Act is self governing with its own rules of procedure and unless where the rules of the Civil Procedure are imported they cannot be invoked.

7. Secondly, under the provisions of **Rules 29 (1)** it is provided that:-

“Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his advocate, at the address stated in the advertisement of the petition, notice of his intention to appear.”

The rules further provides how the notice should be filed as provided for in form number 13 with such variations as the circumstances may require. A casual look at form 13, it is obvious that none of the two firms of Advocates have filed a proper notice of appointment by persons who intend to appear in the petition. I however find this is a procedural defect which can be cured in the interest of justice by this court granting leave to the two firms of advocates to file proper notices of appointment and the required answers within thirty (30) days.

The Petitioner and Official Receiver shall be entitled to costs to be paid by the two firms.

RULING READ AND SIGNED ON 23RD APRIL 2010 AT NAIROBI.

**M. K. KOOME
JUDGE**