

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 3 of 2009

IN THE MATTER OF LES BELLES SAUVAGES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

By a petition dated 22nd January 2009 which was presented to the court on 28th January 2009, Mona Hussein Ali Duale (*the petitioner*), a director of Les Belles Sauvages Limited (*hereinafter referred to as the company*) applied to wind up the company on the grounds, *inter alia*, that the affairs of the company were being conducted in a manner that was oppressive to the petitioner and therefore in the circumstances it would be just and equitable that the company be wound up and provisional liquidator to be appointed forthwith to take over the assets of the company before they are illegally liquidated. The affidavit verifying the petition by the petitioner sworn on 23rd January 2009 and was filed in court on 28th January 2009. The company, upon being served with the petition, appointed Messrs Kamau Kuria & Kiraitu advocates to act on its behalf.

On 27th February 2009, the said firm of advocates filed a notice of motion on behalf of the company under Rules 7 & 27 of the Companies (*Winding Up*) Rules seeking to have the petition filed herein struck out with cost. The company contends that the petition, as filed, was fatally defective as it was verified by an affidavit that was filed contrary to Rule 25 of the Companies (*Winding Up*) Rules. At the hearing of the application, Miss Mwangi for the petitioner submitted that the petitioner was required to file the affidavit verifying the petition after the petition had been filed. In the present petition, the petitioner had filed the verifying affidavit on the same day the petition was presented to the court. In her view, the petition was defective and should be struck out. Mr. Hira for the petitioner opposed the application. He submitted that the petition was dated 22nd January 2009 whilst the verifying affidavit was dated 23rd January 2009. In his opinion, the verifying affidavit was sworn after the petition had been signed and therefore it could not be said that the petition and the verifying affidavit were presented to the court on the same day. He urged the court to dismiss the application, as in his view, it had no merit.

I have carefully considered the rival arguments made by counsel for the parties to this application. Rule 25 of the Companies (*Winding Up*) Rules provides that:

“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.”

The above rule has been given judicial interpretation by Azangalala J in Nairobi HC Winding Up Cause No.5 of 2007 in the matter of Nyakio Investments Ltd (unreported) and In Re Sheela Supermarket [2004] 2EA 264 and by Emukule J in Nairobi HC Winding Up Cause No. 22 of 2004 – In Re Mode 1996 Security Limited (unreported). For instance, in the Sheela Supermarket case, Azangalala J held at page 265 as follows:

“The only affidavit on record is the one sworn on 30th November 2000. There is no court stamp to

indicate when it was filed. There is no separate filing fees for the same to show that this affidavit was filed after the presentation of the petition. There is no doubt that it was filed together with the petition to which it is annexed. It is clear therefore that the verifying affidavit sworn on 30th November 2000 was not sworn and filed in accordance with the provisions of rule 25 of the Companies (Winding Up) Rules. The result is that the petition in this case has not been verified by an affidavit. It is the verifying affidavit which is the prima facie evidence of the contents of the petition.”

In the above case, Azangalala J struck out the suit after holding that it was incompetent as it had not been verified by an incompetent affidavit.

In the present Winding Up cause, despite protestation by the petitioner, it was clear that the petition and the verifying affidavit were filed in court on the same day. Although the petition and the verifying affidavit were dated 22nd January 2009 and 23rd January 2009 respectively, the two documents were filed in court on 28th January 2009. Mr. Hira submitted that the petitioner had substantially complied with Rule 25 of the Companies (*Winding Up*) Rules since, according to him, the petition was verified with verifying affidavit a day after it was dated. With due respect, I am not persuaded by the argument put forward by Mr. Hira. Rule 22 (1) of the Companies (*Winding Up*) Rules talks of “*presentation*” being the formal filing of a petition in court. Rule 25 provides that the petition shall be verified by an affidavit which shall be filed within four days of “*presentation*” of the petition. It is therefore clear that a verifying affidavit can only be filed in court within four days after the petition has been so filed.

The company’s application dated 27th February 2009, therefore, has merit and is hereby allowed. The petition herein is incompetent. It is not supported by a competent verifying affidavit. Since the verifying affidavit is the pleading that contains evidence in support of the petition, and since there is no such competent affidavit in this winding cause, then, the petition and the said verifying affidavit are incompetent. They are struck out with costs to the company. It is so ordered.

DATED IN NAIROBI THIS 17TH DAY OF JUNE 2009

L. KIMARU

JUDGE