



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**MISCELLANEOUS CIVIL CASE 149 OF 2009**

**IN THE MATTER OF TRITON CO. LTD. (IN RECEIVERSHIP)**  
..... **PLAINTIFF**

**VERSUS**

**IN THE MATTER OF COMPANIES ACT, CHAPTER 486 OF THE LAWS OF KENYA**  
..... **DEFENDANT**

**R U L I N G**

The applicant did on 4.03.09 file this Chamber Summons under **Rules 3, 4 and 9** of the **Companies Act, Section 220 (a), 348 (1)** and **Section 19** of **Stamp duty Act** and **Section 3A, Civil Procedure Act** and **Order 39 Rules 2 and 3** of the **Civil Procedure Rules**. The orders sought and not dealt with are number (3), (4) and (5).

That the respondents, their servants, agents, advocates or employees be restrained from presenting to court, advertising or howsoever, in any way taking out Winding Up proceedings or issuing any Winding Up notices against the 1<sup>st</sup> applicant in respect of the claim for Kshs.222,036,170/88 set out in a demand notice dated 12/2/2009 or in respect of any other claim the respondents may make against the first applicant in any way whatsoever pending the determination of Chamber Summons dated 20/1/2009 in Milimani **Misc. Cause No.16 of 2009 – Zahir Sheikh & another vs. Yagnesh Devani & 6 others** and the Receivers and Managers of the 1<sup>st</sup> applicant, thereafter complying with **Section 351 and 352** of the **Companies Act**. And that notice dated 12/2/2009 issued by the 1<sup>st</sup> respondent on behalf of the 2<sup>nd</sup> to 7<sup>th</sup> respondents under **Section 220, Companies Act** be struck out and further costs of this application be to the applicant in any event.

The applicant discloses that a suit under **Companies Act** being Milimani **Misc. Cause No. 16 of 2009 – Zahir Sheikh & another vs. Yagnesh Devani & 6 others** was pending in these courts and was set down for hearing on 20.5.09. It claimed that the Statutory Notice purportedly issued under **Section 220 (a)** of the **Companies Act** is fatally defective for the reasons that the notice is not the hand of creditor and it is served by several creditors who have lumped several debts together and the debt is disputed.

Furthermore the short terms notes are not stamped and cannot be taken as evidence under **Section 19, Stamp Duty Act** and the notes were issued contrary to the consent of the debenture holders. The

supporting affidavit of Zahir Sheikh show that him and Peter Kahi, they are two joint Receivers and Managers, the second applicants while the first applicant is the company for which they are appointed. There is a bundle of documents pages A-P, 1-152 and being exhibit “ZS1”.

In the case of Milimani **Misc. HCC No. 16 of 2009** mentioned above, it is sought to compel the Directors to furnish the statement of affairs to facilitate the filing of accounts at the Companies Registry produced as A-P pages 1-120. On 28/1/2009, the court granted interim injunction preventing the Directors of the first applicant from disposing off any assets or books of the company. Then the first respondent served a notice dated 12/2/2009 headed “Notice of Winding Up” (the company) under **Section 220** by 6 creditors with a claim for Kshs.222,036,170/88 together with interest. Note the last note was due on 9/2/2009. Notice also:-

***“Unless we receive payment within 21 days from the date of this notice, our clients will petition the High Court of Kenya for a Winding Up Order.”***

Thereafter or during that period the respondents were informed that the first applicant was in receivership and the respondents were unsecured creditors and that their claim would be noted in the statement of affairs that was to be filed by Directors of the company. Note that the stand of Receivers and Managers was not for accepting the creditors debts saying that the creditors’ claim would be subject to proof.

The notice exhibited is for a period of 21 days after the date of this notice. However it is clear upon reading **Section 220** that the company must get 21 days before the petition can be presented to court. Therefore the time runs from date of service not date of letter of Statutory Notice.

The firm of Onsonda Oganji & Tiego, Advocates were appointed by the respondents to act for them on 12.3.09. On the same date they filed grounds of opposition that the applicants have no locus to institute these proceedings and that the application is misconceived and an abuse of court process of court. Furthermore, the application is incompetent and fatally defective and the orders sought being discretionary are unavailable to the applicants.

The counsel for the respondents has not filed affidavits but written submissions and in his introduction states that this being an injunctive application the court should be guided by the principles in **Giella vs. Cassman Brown & Co. Ltd. [1993] 1 E.A. 358.** The counsel also reminds this court that at this stage court should not make any final findings, furthermore the respondents have submitted on the issue of the validity of the notice – Statutory Notice dated 12.2.09.

Firstly, the notice is issued by advocate on behalf of 6 creditors. The amount of debt is lumped together. A reading the said **Section** shows that it is one creditor who is permitted to issue notice and the debt is above Kshs.1000/=. The Winding Up Rules do allow any other person who wants to join in support or opposition petition to give their names. Then the notice is clearly to be given under the hand of the creditor. And the notice is stated to be of three weeks (21 days). This must mean that the notice is not from the date of the notice because that would not give 21 days notice.

The notice was addressed to Receivers and Managers. I have stated above that they replied that the process of payments of debts would be followed. The Receivers are appointed by the creditors who are secured and their responsibility is to recover debts of the debenture holders or the secured creditors. This is trite law. The rights of creditors are not breached either under the Constitution or any other law.

It is clear the interest of creditor is postponed only for 21 days and thereafter the petition can be presented to court. In this case, it is not clear what notice period was given. And it is clear the notice was not under the hand of creditor, it was signed by advocate. Regarding the challenge that the application is defective, it is to be noted that the **Rule** invoked is **Rule 9 (p)** and not **9 (b)**. In the circumstances, this challenge has no leg to stand on.

On the issue of short terms promissory notes, it is clear the same are not stamped with the Stamp Duty

and therefore **Section 19 of Stamp Duty Act** is not complied with. There is the issue of the appointment of Receiver that it is defective and the debenture is also defective being not attested by an advocate. It is also argued that the principles in **Giella vs. Cassman Brown** are not complied with by the applicants.

I have perused the submissions of both parties. I have also perused the authorities and it is my opinion that the Statutory demand should be sent by one creditor as stated in the **Act**. The lumping of 6 creditors is not within the requirements of the **Act**. And it must be signed by the creditor under his hand. The 3 weeks (21 days) cannot be said to have commenced on the day the notice is written. The petition must be presented after the expiration of the 21 days.

I am supported by English authority **Lympene Investments Ltd. [1972] 1 WLR 523**. The period starts to run after service. Otherwise the company will be granted an injunction to restrain presentation of a petition. Also the authority in **Cornhill Insurance PLC vs. Improvement Services Ltd. [1986] 1 WLR 114** where a creditor with ?1,154 remained unpaid by an insurance company whose profit for 1985 was ?11 million.

However, it is clear that for a party to obtain an injunction restraining presentation of a petition, it must be proved that the petition would be unsustainable. In the present case the respondents can always file suit to recover the debt if after secured creditors are satisfied there is left over assets then these creditors may be able to recover. As it appears these 6 creditors (respondents) are bent on stealing a march over the other creditors, if any.

In the case of **Eric Cans Hanna vs. International Homes Ltd & others**. The petition was already filed and only one ground was being argued namely to restrain the respondent from advertising the petition. In that case the court was of the view that as the striking out of the petition would bring to an end the petition presently the petitioner would be greatly prejudiced. In the present case the petition is not filed and the creditors can start afresh.

**Section 218, Companies Act** empowers the High Court to wind up any company registered in Kenya. Looking at Halsbury Laws of England, 3<sup>rd</sup> Edition paragraph 1038, it stated:-

***“Where a petition has not been presented but is threatened in respect of a disputed debt an injunction may be granted restraining the presentation.”***

The respondent has chosen to rely on Grounds of Opposition dated and filed on 12/3/2009. These are statements not on oath and therefore the facts sworn by the plaintiff are not controverted.

The applicant relies for this proposal the decision of court in **HCC No.42 of 2007 – Adrian Bearing & another vs. James Muyoya & another** at page 23. Further the applicant relies on the case of **“In the matter of E.T. Monks Ltd.”** where the court found that there was no affidavit to oppose the allegations. Therefore the applicant submits that there are undisputed facts namely; (1) Statutory Notice dated 12/2/09 issued under **Section 220, Companies Act** by first respondent was demanding Kshs.222,036,170/88 due from 6 creditors without indicating the debt of each creditor. The above **Section** states:- .....

The notice gave 21 days as stipulated in the **Act**. No affidavit of service is filed to prove the date of service of notice. The law gives 21 days after the date of service. Notice “within 21 days” shows the law demands any shorter period than that given.

Further the 5<sup>th</sup> respondent denies having instructed the first defendant to issue Statutory Notice. The 5<sup>th</sup> defendant sought to be withdrawn from suit and it was done by consent on 24/3/09. The **Companies Act, Section 220** permits a creditor who is owed a sum of over Kshs.1000/= to petition for company Winding Up if the demand notice for payment under the hand of creditor requiring paying within 3 weeks is served and if no payment or to secure or compound to reasonable satisfaction of the creditor. The law permits the creditor to present a petition for Winding Up of the company **Section 19 of Stamp Duty Act** prohibits a court to admit evidence of documents unless they are affixed with revenue stamp.

The promissory notes herein are therefore inadmissible. In addition, the applicant has relied on decisions of the court in support of its case. The first authority is **Kenya Cashew Nuts vs. National Cereals & Produce Board** where the court held that the Judge must be satisfied that the Notice complies with the requirements of the law and must be under the hand of the creditor. Again Justice Shah in the matter of **Container Clear & Transport Services Ltd. – Winding Up Cause No. 8/1994** that notice prior to winding up under **Section 220, Companies Act** must be signed by a creditor. Where there is a disputed debt the petition cannot succeed.

The applicant relies on authority of **Matic General Contractors vs. KPLC** Court of Appeal decision and **Re Global Tours & Travel Ltd.** in applicant's list of authorities. In **Re The Southard & Co. Ltd.** a disputed debt will be treated as an abuse of court process. In Court of Appeal decision in the case of **Caveast Archives Ltd. vs. Kenya Shell & Komassai Plantations vs. Bank of Baroda**, the court held that any notice giving less than the statutory demand period is invalid. Notice dated 12/2/2009 is therefore defective as it gives less than 21 days' notice and does not specify what amount each creditor is demanding.

The issue of the appointment of debenture instrument was determined in Milimani **HCCC No.762/2008 – Triton vs. KCB & others.**

The counsel for the defendants submits that this being an injunction application the court should be guided by the case of **Giella vs. Cassman Brown & Co. Ltd.** (citation given). Furthermore, it is for the court to determine the validity of the debt and the Statutory Notice. There was no evidence that the notice was challenged before filing petition.

On this point the respondents rely on **Alliance Media Kenya Ltd. vs. World Duty Free Company T/A Kenya Duty Free Co. Ltd. (2005) e KLR.** Further submissions that **Section 222 (1)** of the **Companies Act** provides that court may make any order, interim or otherwise. The defendant/respondent also relies on the case of **Cains Hanna vs. International Homes Ltd. & others (2005) e KLR 6.**

It is submitted that notice was signed by the advocate instructed, therefore it is valid. They relied on the **Re Prime Outdoor Network Ltd. (2005) e KLR 4.** It is submitted that **Section 220** contemplates that a notice may issue by more people who own it jointly and severally. The notice issued and exhibited at page 126 covers seven creditors with different claims. The notice served was written and signed by advocate for first respondent.

This is contrary to provisions of **Companies Act, Section 220 (a)**. The notice of demand "under his hand". The respondents are unsecured creditors. It is sworn that the debt is disputed. The first applicant had executed debentures and debenture holders rank in priority to unsecured creditors.

Upon considering the arguments of both sides and the pleadings by the applicant, it is clear that the Statutory Demand Notice is defective and not in compliance with **Section 220 (a)** of the **Companies Act**. It does not allow for 21 days as required. It was not signed by the creditor (under the hand of) and purports to be given by 6 creditors who are not joint or severally claiming one debt. Furthermore, the creditors are exerting pressure upon the applicants to pay knowing very well that the company is in receivership. The debt is also disputed.

It is my view that the applicants have demonstrated that the threatened Winding Up Petition if presented, would not succeed. I therefore grant orders restraining the respondents, their agents, servants, advocates or employees from presenting to court, advertising or howsoever, in any way taking out any Winding Up cases, proceedings or issuing any Winding Up Notices against the first applicant in respect of the claim for Kshs.222,036,170/88 set out in the Notice dated 12/2/09 or in respect of any other claim the respondents may make against the 1<sup>st</sup> applicant in any way whatsoever pending determination of Chamber Summons dated 20/1/2009 in Milimani **Misc. Cause No. 6 of 2009 – Zahir Sheikh & another vs. Yagnesh Devani & 6 others** and Receivers and Managers of the first applicant thereafter complying with **Section 351 and 352 of Companies Act**.

I also strike out the statutory demand notice dated 12/2/09 issued by first respondent on behalf of the 2<sup>nd</sup> to 7<sup>th</sup> defendants under **Section 220 Companies Act**. I award all costs incurred in these proceedings be paid to the applicants by the respondents.

Orders accordingly.

**DATED, SIGNED and DELIVERED** at Nairobi this 13<sup>th</sup> day of July 2009.

**JOYCE N. KHAMINWA**

**JUDGE**