



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Winding Up Cause 20 of 2005

IN THE MATTER OF BUSTRACK LIMITED

AND

IN THE MATTER OF COMPANIES ACT

R U L I N G

This is an application to set aside the decision of this court to wind-up the company.

The application was made pursuant to Section 228 of the Companies Act, as read together with The Companies (Winding-up) Rules.

In the first instance, the company sought and was granted leave of the court to commence these proceedings. The said leave was granted by the Hon. Kasango J., on 14th March 2006. On that same date, the learned judge ordered that there would be a stay of the appointment of the Official Receiver over the assets and management of the company.

Although the orders for stay were granted for a limited period of time, the orders were thereafter extended from time to time, and were in force all through the period when the substantive application, to set aside the winding-up order was pending.

As I understand it, the company's main ground for seeking to set aside the winding-up order is that the said company was never served with either the demand for payment under Section 220 of the Companies Act, or even with the Petition.

The company also denies ever having been served with a Hearing Notice in relation to the petition. Therefore, it is contended that the company was deprived of its day in court, prior to the making of the winding-up orders.

Another issue raised by the company was that the documents adduced in evidence did not prove that the company owed the alleged debts. If anything, the company asserts that the debt was disputed, and could not therefore form the basis for a winding-up order against it.

However, the Petitioner believes that the application had no basis whatsoever. The first reason for that submission was that the company was fully aware of the Petition, hence its decision to file a Constitutional Reference, being **Misc., Civil Suit No. 413 of 2005**.

Mr. Siekei, Advocate for the Petitioner, submitted that the petition was served upon the company on 30th June 2005.

Service is said to have been effected at the company's last known principal place of business. The explanation for service at that place was that the petitioner had the option to either serve the company at its registered office or at its last principal place of business. Therefore, as far as the petitioner was concerned, even though the company was not served at its registered office, the service of the petition herein was not defective.

Meanwhile, as regards the Hearing Notice, the Petitioner submitted that the company was properly served, by way of registered post.

The address to which the Hearing Notice was served was obtained by the Petitioner from the Contract Supply Agreement dated 12th August 2003, whereat the postal address of the company was given as;

“BUSTRACK LIMITED

P. O. BOX 30563

NAIROBI,

KENYA.”

And in relation to the statutory demand, pursuant to Section 220 of the Companies Act, the Petitioner submitted that the same was duly served, by registered post. Another copy of the same is said to have been delivered by hand.

As far as the Petitioner is concerned, the spirit of the law, as spelt out in Section 220 of the Companies Act is that the company should receive due notification. Once that was done, the Petitioner submits that it mattered not that the service had not been effected at the company's registered office.

Having given due consideration to the application, I take the following view on the matters raised.

First, even though Mr. Edwins Masimba Mukabanah, the company's Managing Director deponed, on oath, that the company was not invited to attend at the High Court registry, at the time of fixing a hearing date, there is a clear letter of invitation on record. The said letter bears the stamp of the company, indicating that the company received it on 3rd November 2005. Therefore, I find that the company was indeed invited to fix hearing dates for the petition.

On the designated date, being 9th November 2005, the petitioner's clerk Mr. Mutuma, was at the registry. However, the company did not have any representative. Consequently, the hearing date of 6th February 2006, was fixed in the absence of the company.

As the hearing date had been fixed exparte, there was need to serve the company with an appropriate Hearing Notice. In that regard, the petitioner sent a Hearing Notice to the company, by way of registered post, to P. O. Box 30563 NAIROBI. The Petitioner also caused a copy of the Hearing Notice to be left with the company's;

“security men after they denied me entry into their main office at Kawangware,”

Pursuant to the provision of Section 108 (1) of the Companies Act;

“Notice of the situation of the registered office and the registered postal address, and of any change therein, shall be given within fourteen days after the date of incorporation of the company or of the change, as the case may be, to the registrar of registration.”

In this case, the company has demonstrated that its registered office, as from 28th September 2001, was at L.R. No. 2/544 & 545, ELGEYO MARAKWET ROAD, off ARWINGS KODHEK ROAD, NAIROBI. The company also demonstrated that its registered postal address was P. O. Box 48405 – 00100 NAIROBI.

Accordingly, I find that the Hearing Notice was not served either at the company's registered office or at the company's registered postal address. Indeed, the Petitioner concedes as much.

By virtue of Section 108 (2) of the Companies Act;

“The inclusion in the annual return of a company of a statement as to the situation of its registered office or as to its registered postal address shall not be taken to satisfy the obligations imposed by this section.”

In effect, the only recognised mode for any company to give notification of its registered office or its registered postal address, is through a Notice to the registrar of registration.

The law categorically states that even if a company should cite its registered office or its registered postal address in its annual returns that would not satisfy the requirements of Section 108(1) of the Companies Act.

That being the position in law, the fact that the company did cite a postal address in its **“Supply Contract Agreement”** dated 12th August 2003, did not, and could not render the said address the company's registered postal address.

Section 391(1) of the Companies Act stipulates as follows, under the title;

“Service of Documents”

“A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.”

In this case, we have already seen that P. O. Box 30563, NAIROBI, is not the company's registered postal address. Also the alleged **“main office at Kawangware”** is not the company's registered office. Thirdly, when documents are left with **“security men”** who then promised to deliver them to their bosses, that cannot be construed as personal service on the company. In effect, I find that the company was not duly served with the Hearing Notice, as is required by law.

That finding alone is sufficient to result in the setting aside of the judgement which was arrived at after the hearing proceeded ex parte.

However, I believe that it is nonetheless necessary for me to give consideration to the arguments pegged on the alleged non-service of both the statutory demand as well as of the petition.

Section 220 of the Companies Act provides a definition of a company's inability to pay its debts. It says;

“A company shall be deemed to be unable to pay its debts –

(a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.”

Although there are two other instances cited as (b) and (c), which would also constitute a company's inability to pay its debts, the only relevant one in this case is (a), cited above.

That statutory provision gives only one mode of service of a demand. It says that the demand, which is under the creditor's hand, is to be left at the company's registered office.

So unlike in the case of in the case of other documents, which are provided for under S. 391(1) of the Companies Act, the demand by a creditor, pursuant to Section 220 is required to be served at the company's registered office, and nowhere else.

Yet in this case, the Petitioner caused the demand to be sent by registered post.

As I understand it, the company does not deny receipt of the statutory notice. Their complaint was that the said demand was **"never made in the requisite manner."**

Indeed, there was no way that the company could have honestly denied receipt of the statutory demand, whereas in the affidavit sworn by Edwin Masimba Mukabanah, on 24th March 2005, in the case of **KENYA BUS SERVICES LIMITED & 2 OTHERS V ATTORNEY GENERAL & ANOTHER, MISC. SUIT NO. 413 of 2005**, he had expressly said;

"BP Kenya Limited has served both Kenya Bus Services Limited and Bustrack Limited with Winding Up Notices dated 18.03.2005 under Section 220 of the Companies Act of their intention to wind up both KBS and Bustrack. Shown to me are copies of the winding up notices marked EMM 5 and 6."

Notwithstanding the fact that the company was actually served with a notice pursuant to Section 220 of the Companies Act, I hold that the mode of service was irregular. It was not in compliance with the requirements of statute.

Meanwhile, as regards the service of the petition, the petitioner submitted that the company was duly served on 30th June 2005. The said service is said to be in compliance with the provisions of Rule 24(1) of the Companies (Winding Up) Rules.

It is the Petitioner's case that the petition was served at the company's last known principal place of business. The petitioner says that it had the option of serving the company either at its registered office or at its last principal place of business.

What does the law say?

Rule 24(1) of the Companies (Winding-up) Rules stipulates as follows:

"Every petition shall, unless presented by the company, be served upon the company at its registered office, if any, and if there is no registered office, at the principal or last known principal place of business thereof, by leaving a copy of the petition with any member, officer or servant of the company, or, if no such member, officer or servant can be found, by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer or servant of the company as the court may direct; and where the company is being wound up voluntarily, the petition shall also be served upon the liquidator, if any, appointed for the purpose of winding up the affairs of the company."

Clearly, the preferred mode of service of a petition is to have it served at the company's registered office. It is only in instances where the company has no registered office that the petition may be served at the company's principal or last known principal place of business.

The affidavit of service, sworn by the process server, Mr. George Muema, indicates that on 30th June 2005, he went to College House, Monrovia Street, where he met a Mr. Ben, who was the company's

Assistant Claims Officer. The said officer referred the process server to the offices of the company's Managing Director, which offices were located at Gilgil House, Monrovia Street.

Upon reaching the office of the Managing Director, the process server met Ms Phyllis, who was the secretary to the Managing Director.

According to the process server, the Managing Director then instructed his secretary to refer the process server to Mr. Kungu or Mr. Ben at the company's Claims Department. It is in those circumstances that the process server then served the petition on Mr. Ben, who accepted service thereof by signing and stamping the back of the petition.

The company's Managing Director now states, on oath, that the process server's affidavit of service was false. However, the Managing Director did not elaborate on his said assertion of falsehood.

Therefore, the court has no idea whether or not Mr. Mukabana's office was located at Gilgil House, Monrovia Street. We do not know if the secretary to Mr. Mukabana was or was not one Phyllis, at the material time.

Also, he does not say whether or not the company had two people, namely Kungu and Ben, in its Claims Department.

In effect, I find the contention that the affidavit of service was false, so vague as to be totally meaningless.

Furthermore, the company made no effort whatsoever, to have the process server cross-examined as to the alleged falsehood, so as to assist the court make an informed decision.

In the result the company failed to satisfy me that the process server stated any falsehood, in his affidavit of service. Accordingly, I find no reason to reject any of the statements in the affidavit of service.

In effect, I find that the petition was served upon Mr. Ben, at the company's Claims Department, which is located on the 2nd floor of College House.

However, inasmuch as the Petitioner has not satisfied me that the company did not have a registered office, I nonetheless hold that even though the petition was served, the said service was irregular.

In view of the fact that a winding-up order is essentially the death knell of a company, it is imperative that the petitioner complies strictly with all the statutory and procedural provisions governing winding-up proceedings. In this case, the statutory demand under Section 220 of the Companies Act was not served as is provided by law. Also the petition and the Hearing Notice were not served in strict compliance with the law.

Accordingly, I find and hold that this is a proper case for the setting aside of the judgement dated 9th March 2006. In effect, the winding-up order is hereby set aside.

The success of the company has been achieved on the basis of technicalities. That notwithstanding, it is a success. Therefore, even though the petitioner may yet prove its case against the company, if the confidence their counsel displayed before me is anything to go by, I have no reason to deprive the company of the costs of the application dated 13th March 2006.

In the result, the costs are awarded to the company, in any event.

Dated and Delivered at Nairobi, this 14th day of February 2007.

FRED A. OCHIENG

JUDGE