



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

Winding Up Cause 31 of 2005

IN THE MATTER OF STAINLESS STEEL PRODUCTS LIMITED

AND

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

ISA ENTERPRISES LIMITEDPETITIONER

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This ruling relates to a preliminary objection raised by the Petitioner to the application by notice of motion dated 7th March 2006. In that application the Company seeks the following main orders against the Petitioner:-

1. That the Petitioner, its servants and agents be restrained from advertising in any way the petition herein (for winding-up of the Company) and from notifying by whatever means any other person of the institution of the winding-up cause herein.
2. That the Petitioner do provide security for costs of these proceedings.
3. That the petition be struck out.

The preliminary objection is raised by notice dated 12th May, 2006 upon the stated grounds that the application is vexatious, defective and bad in law.

The submission of the learned counsel for the Petitioner was that the application is incompetent as it has invoked procedural law that is not applicable; that the Companies (Winding-Up) Rules and the Companies (High Court) Rules do not provide for an injunction as is sought; and that Order 39 of the Civil Procedure Rules should thus have been invoked because rule 3 of the Companies (High Court) Rules imports the Civil Procedure Rules into Company matters. It was further submitted that the application is also fatally defective for not giving the notice required by Order 50, rule 15 (2) of the Civil Procedure Rules. Finally, it was submitted for the Petitioner that the Company should not be permitted to apply because it has not opposed the petition as it has not filed an opposing affidavit as required by rule 31 of the Companies (Winding-Up) Rules.

In his reply, learned counsel for the Company submitted that under rule 7 of the Companies (Winding-Up) Rules all applications other than a petition must be brought by notice of motion; and that the practice of moving the court to restrain advertising of a petition is now well established in our jurisdiction. He further submitted that the Civil Procedure Rules have no application to the application at hand, the Companies (Winding-Up) Rules being comprehensive and adequate. Learned counsel also pointed out that reference to the word "Order" in the application was a typographical error as it is clear that what was intended was to refer to the various quoted rules of the Companies (Winding-Up) Rules; the error can be easily corrected without prejudice the Petitioner.

Regarding the argument that no opposing affidavit has been filed in response to the petition, learned counsel submitted that failure to file the opposing affidavit was deliberate because the Company has taken the position that the petition is defective for non-compliance with rule 25 of the Companies (Winding-Up) Rules in that the petition is not verified by an affidavit as required. He pointed out that an order to strike out the petition is indeed sought in the application at hand.

I have considered the submissions of the learned counsels appearing, including the various authorities. The main issue raised in the preliminary objection is whether or not the notice of motion dated 7th March, 2006 is properly before the court. I accept that the word "Order" is inadvertent and probably a typographical error; it is clear that it was intended to refer to the various rules of the Companies (Winding-Up) Rules set out in the application. The application is stated to be brought under rules 5(2), 7(1), 23, 25, 31, 202 and 203 of the Companies (Winding-Up) Rules. Rule 3 of the Companies (High Court) Rules and sections 221(i), & (iii), 222(i) and 344 of the Companies Act (the Act) have also been invoked.

It seems to me that the learned counsel for the Company quoted all the provisions he could think of, unnecessarily, I might add. Rule 5(2) permits the application to be heard in chambers. Rule 7(1) dictates that applications other than a petition shall be by motion. Rule 23 deals with advertisement of petitions while rule 25 deals with verification of petitions. Rule 31 provides for affidavits in opposition and reply to petitions.

Rule 202 provides that no proceedings under the Act or the Rules shall be invalid by reason of any formal defect or any irregularity unless the court before which any objection is made to the proceedings is of opinion that substantial injustice has been caused by the defect or irregularity, and that injustice cannot be remedied by any order of the court. Finally, rule 203 provides for application of the rules and practice of the court (read the Civil Procedure Rules) where no other provision is made by the Act or the Rules unless the court otherwise directs.

Rule 3 of the Companies (High Court) Rules provides that any proceedings brought under those Rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and any rules made thereunder, and that the general practice of the court, including the course of procedure and practice in chambers, shall apply so far as may be practicable, except if and so far as the act or those rules otherwise provide. It is sufficient to note that the petition herein is brought under the Companies (Winding-Up) Rules, and not under the Companies (High Court) Rules.

Essentially the application is properly before the court. It is unfortunate that the court has to spend time over technicalities of procedure rather than engage in the substantial issues before it. The substantial issues raised in the application are whether temporary injunction should issue to restrain advertisement of the petition, whether the Petitioner ought to provide security for costs of the proceedings and whether the petition should be struck out. It has not been argued that the court has no jurisdiction to grant the orders sought. Those issues ought to be permitted to be canvassed.

In the result, I find no merit in the preliminary objection. It is hereby overruled with costs to the Company. Orders accordingly.

DATED AT NAIROBI THIS 28TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 31st DAY OF AUGUST, 2007