



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**Winding Up Cause 28 of 2006**

**IN THE MATTER OF HIGHLANDS MINERAL WATER COMPANY LIMITED**

**AND**

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

**SAFEPAK LIMITED .....PETITIONER**

**V E R S U S**

**HIGHLANDS MINERAL WATER COMPANY LIMITED.....RESPONDENT**

**R U L I N G**

The Respondent in this winding-up cause, HIGHLANDS MINERAL WATER COMPANY LIMITED (hereinafter called “the Company”), has sought by notice of motion dated 10<sup>th</sup> January, 2007 the main relief that there be an order of stay of all proceedings in this cause (and further, that the Petitioner be restrained from taking any other step whatsoever) until determination of Nyeri HCCC No. 56 of 2006 between the same parties (hereinafter referred to as “the Nyeri case”). The application is brought under sections 3A and 6 of the Civil Procedure Act, Cap. 21 and also under rule 7 of the Companies (Winding-up) Rules. The grounds for the application appearing on the face thereof are:-

- (1) That there is an interim order of injunction in place in the Nyeri case that prohibited the filing of the petition herein.
- (2) That the Nyeri case is a suit pending between the same parties.
- (3) That this winding-up cause violates section 6 of the Civil Procedure Act.

There is an affidavit sworn in support of the application by one **ASHWIN KARSANDASS PADIA**, the managing director of the Company.

The Petitioner has opposed the application as set out in the replying affidavit filed on 6<sup>th</sup> February, 2007. That affidavit is sworn by one **TUSHAR SHAH**, the managing director of the Petitioner. The grounds of objection to the application as appear from the said replying affidavit are, *inter alia*:-

- (1) That there is no provision under the Companies Act, Cap. 486 for staying a winding-up petition; the application therefore does not lie.
- (2) That in any case there are no grounds, or good grounds, to warrant issuance of the orders sought.

- (3) That there is no order, or valid order, of injunction subsisting in the Nyeri case as alleged, the *ex parte* order of temporary injunction issued therein on 9<sup>th</sup> October, 2006 having lapsed after fourteen (14) days under Order 39, rule 3(2) of the Civil Procedure Rules.
- (4) That when the winding-up petition was lodged there was no order, or valid order, of injunction restraining the Petitioner from filing the petition or advertising the same.
- (5) That any alleged contempt of any order issued in the Nyeri case ought to be ventilated in that suit.
- (6) That there was inordinate delay in bringing the application.

I started hearing this application on 13<sup>th</sup> February, 2007. On 13<sup>th</sup> March, 2007 the learned counsels appearing informed the court that the application for temporary injunction in the Nyeri case (upon which the *ex parte* interim injunction was given) was argued *inter parties* on 5<sup>th</sup> March, 2007 by consent of the counsels appearing there, notwithstanding that they knew that hearing of this present application was going on. The *ex parte* interim injunction at Nyeri had been granted by Khamoni, J; the application for temporary injunction was heard *inter parties* by a different judge (Makhandia, J). Learned counsel for the Petitioner, Mr. Muthui, was of the view that the issues canvassed at Nyeri were substantially the same issues being canvassed before this court. He suggested that hearing of the present application should not proceed any further, lest the two courts give conflicting decisions; alternatively, that once delivered, the ruling at Nyeri be brought to the attention of this court so that I may decide whether it will be prudent to hear to conclusion the application herein and deliver ruling.

Mr. Nowrojee, learned counsel for the Company, was of a different view. According to him, the issues in the two applications were completely different, and there was no possibility of conflicting decisions. He suggested that we complete hearing of the present application and then await the ruling at Nyeri before I give my ruling herein.

I directed that the submissions in this application be completed and then I await the decision in the Nyeri case before I decide whether or not to render a decision herein. The submissions were duly completed.

In due course I was supplied with a copy of the ruling dated 19<sup>th</sup> March, 2007 in the Nyeri case. I have read the same. Makhandia, J found that the *ex parte* order issued by Khamoni, J (by its particular wording) was to remain in place until the *inter partes* hearing of the application; he however had misgivings about that wording that enabled the *ex parte* order to remain in force beyond the fourteen (14) days stipulated under Order 39, rule 3(2) of the Civil Procedure Rules.

What was the Nyeri case about? In it the Company sued the Petitioner seeking the following main reliefs:-

- (1) A permanent injunction to restrain the Petitioner from issuing any process under the Companies Act, Cap. 486 against the Company.
- (2) That the Company be permitted, in effect, to pay its indebtedness to the Petitioner after due hearing.

Makhandia, J found that the Company did not deny owing the Petitioner the sum of KShs. 33,880,494/59, the same debt that prompted the winding-up proceedings. He further found that the Company had rushed to court with dirty hands for an injunction to restrain the Petitioner from pursuing a legally recognised process of recovering debts owed by registered companies (winding-up proceedings). He also found that the Petitioner was entitled to elect whatever lawful mode it chose to recover its money, including a winding-up petition. He found in the end that the Company had not demonstrated a *prima facie* case with a probability of success. He left to this court to decide, if canvassed before it, whether or not the petition for winding-up was actuated by malice on the part of the Petitioner.

Regarding irreparable loss, Makhandia, J found that the Company would suffer none. On balance of

convenience, he was of the view that the Company having admitted its indebtedness to the Petitioner, it is only fair that the Petitioner be allowed to pursue the process of recovery that it has chosen, i.e., the winding-up proceedings.

It is to be noted that the order of stay of all proceedings is sought herein pending determination of the Nyeri case. A judge of co-ordinate jurisdiction (Makhandia, J.) has found that the Company has not demonstrated a *prima facie* case there with a probability of success. He has also expressed the view that the Petitioner ought to be permitted to pursue the lawful mode of recovery of the debt owed to it by the Company that it has chosen, i.e., the winding-up proceedings.

Many important issues have been raised in the present application. But with the findings of Makhandia, J in the Nyeri case, these issues have now become moot. If I were to consider the application on its own merit and allow the application, this would no doubt fly in the face of the findings of Makhandia, J; in effect one judge will have told the Petitioner, you may proceed with your winding-up petition against the Company, and another judge will have told the Petitioner, you may not do so. This should not be permitted.

I will therefore decline to render any decision on the various issues raised in this application, including the application itself. I hold that the application has been overtaken by the ruling dated 19<sup>th</sup> March, 2007 delivered in Nyeri High Court CC. No. 56 of 2006 between the same parties. I hereby mark the application as spent. Parties shall bear their own costs on the application. There will be orders accordingly.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 3<sup>rd</sup> DAY OF AUGUST 2007**