



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

**Winding Up Cause 27 of 2006**

**IN THE MATTER OF GITATHURO KARIOBANGI COMPANY LIMITED**

**AND**

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

**RULING**

For hearing before me was a Notice of Motion dated 20<sup>th</sup> September 2007 for hearing when Mr. Kanyi Ndurumo, Counsel for the Respondent, raised a Preliminary Objection.

The Notice of Motion is filed by the Applicant in a petition in a Winding Up Cause both of which were filed through the Petitioner's and therefore the Applicant's Advocate. The Advocate handling the matter for the Petitioner and for the Applicant before me on 3<sup>rd</sup> October 2007 when Mr. Ndurumo raised the Preliminary Objection was Mr. Auta Nyakundi.

The Notice of Motion seeks orders for the appointment of the interim liquidator of Gitathuro Kariobangi Co. Ltd., and it is supported by the affidavit of Dominic Gathecha Kinyanjui who says in that affidavit, also dated 20<sup>th</sup> September 2007, that he is the Petitioner in the suit. That is inconsistent with the Petition at paragraph 7 where the Petitioner is said to be Kariuki & Gathecha Resources Limited.

The relationship between Dominic Gathecha Kinyanjui and Gathecha Resources Limited, a limited liability company, is not disclosed. The legal effect is that the matter has two different petitioners each acting on his own in seeking various orders against the Respondent. That is why Mr. Ndurumo raised this Preliminary Objection submitting that the affidavit is defective and incompetent and that since that goes to the substance of that affidavit, it should be struck out together with the Notice of Motion as the said Notice of Motion cannot in law, stand when the supporting affidavit is struck out. He relied on Order III Rule 2 of the Civil Procedure Rules and cited HCCC No. 810 OF 2001 **Microsoft Corporation –vs- Mitsumi Computer Garage Ltd. And Mitsuminet (K) Limited.** (Unreported).

Mr. Nyakundi opposed the Preliminary Objection relying on HCCC No. 8 of 2003 **In The Matter of Gilani Butchery Ltd. And In The Matter of The Companies Act** (unreported). He also referred to HCCC No. 82 of 2003 (OS), Mary Kinyua Kinoti –vs- Robert Kinoti Kirera (Unreported) and also High Court Miscellaneous Application No. 1587 of 2003 **Johann Distelberger –vs- Joshua Kivinda Muindi & Another** (unreported).

Mr. Nyakundi's argument was that the defect present is a mere misdescription of the party which is not serious and that even if it were serious and goes to the substance of the Notice of Motion, the Civil Procedure Act and its rules are not applicable as this is commercial matter and is fully governed by provisions of the Companies Act. He could not, however, mention the relevant provisions of the Companies Act applicable to resolve the preliminary objection raised by Mr. Ndurumo who referred to "**THE COMPANIES (HIGH COURT) RULES** at page 347 of The Companies Act where Rule 3 states as follows:

**"Any proceedings brought under these Rules shall be deemed to be suit within the meaning of the Civil Procedure Act and any Rules made thereunder, and 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."**

"Court" is defined as meaning "**the High Court**" and includes "**any judge or other officer who for the time being exercise the jurisdiction of the High Court in company matters;**". Mr. Ndurumo therefore insisted that the Civil Procedure Act and its rules are applicable.

I think the correct position is the one taken by Mr. Ndurumo. Otherwise Mr. Nyakundi would like the defect, so clearly seen in this matter, just be left in a vacuum where provisions of the Civil Procedure Act do not apply yet the Companies Act has no provisions under which such defects can be resolved so that Mr. Nyakundi gets the best of all the world. Do I understand that would be fair in law? I do not endorse it.

Accordingly I do hereby uphold the objection raised by Mr. Ndurumo, do strike out the defective affidavit of Dominic Gathecha Kinyanjui dated 20<sup>th</sup> September 2007 in support of the Notice of Motion herein also dated 20<sup>th</sup> September 2007 and do proceed further to strike out the said Notice of Motion with costs to the Respondent.

Winding Up Cause No. 26 of 2006 is similar to this cause and the two are being handled together and upon request by both learned counsel, the decision herein to apply also to Winding Up Cause No. 26 of 2006 the affidavit in question in Winding Up Cause 26 of 2006 being the one dated 18<sup>th</sup> September 2007.

Dated this 22<sup>nd</sup> day of October 2007.

**J. M. KHAMONI**

**JUDGE**