



IN THE MATTER OF UNITED INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF COMPANIES ACT, CHAPTER 486

OF THE LAWS OF KENYA

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OF THE LAWS OF KENYA

R U L I N G

By a notice of motion dated 2nd November 2007, filed on 5th November 2007, United Insurance Company (herein referred to as the Company), has moved this court under Order L Rule 1 and 2 of the Civil Procedure Rules, Sections 219 (e) and (f), 222, 223 and 224 of the Companies Act and the Companies (Winding Up) Rules, for orders: -

- 1) That the Winding Up petition be and is hereby struck out with costs.
- 2) That the Winding Up Petition is hereby dismissed with costs.
- 3) That the Company do have costs of the application and the Winding Up Cause.

The background to the motion is that the Company is a limited liability Company incorporated under the Companies Act (Cap 486) and licensed has been a Insurer pursuant to the provisions of the Insurance Act (Cap 487) Laws of Kenya from December 1987. On 15th July 2005, the Commissioner of Insurance, acting in accordance with Section 67 C (2), (i) of the Insurance Act (Cap 487) placed the company under statutory management for failing to comply with various mandatory provisions under the Act. The tenure of the Statutory Manager and the Moratorium was extended by the court on 12th July 2006.

Following a report made by the Statutory Manager which revealed *inter alia*, that the Company was unable to meet reasonable expectation of policy holders, and was also unable to pay its debts, the Commissioner of Insurance filed a petition seeking the Winding Up of the Company and the appointment of an interim liquidator. It is this petition that the Company seeks to have struck out.

By a notice of preliminary objection filed on the 7th November 2007, the petitioner has raised an objection to the hearing of the Company's Notice of Motion dated 2nd November 2007, contending that the motion is bad in law, incompetent, misconceived and an abuse of the court process for the following reasons: -

Firstly, That the court has no jurisdiction to grant the orders sought, since none of the sections under which the application is brought, gives the court powers to strike out a Winding Up Petition, and the correct procedure has not been followed in seeking the orders sought.

The case of **Bunson Travel Service Limited and Others vs Kenya Airways Limited HCCC No.304 of 2004**, was relied upon for the proposition that an objection on jurisdiction ought to be taken at the earliest opportunity, and that the question to ask is what procedural steps the party before court is required to take in order to properly invoke the jurisdiction of the court.

Winding Up Cause No. 10 of 2003, In the Matter of Yorkhouse Properties Company Limited was also relied upon for the submission that invocation of the wrong procedural format is a procedural lapse which ought to be excused if it is shown not to have occasioned any injustice to the adverse party, and that the Companies Act and Winding Up Rules having no specific procedure, the court was entitled to invoke the provisions of the Civil Procedure Act and Rules with relation to amendment of pleadings.

The following cases:

- **Nyeri HCCC No.37 of 2006, Dr. Moses Njue Gachoki & Another vs The Registrar & 2 Others.**
- **HCCC (Kisumu) 336 of 1999 and Prafula Enterprises Limited vs Norlake Investments Limited & Another.**
- **Tabutany Cherono Kiget & Others vs Grace Chemutai Kiget P & A 157 of 2001 (Kericho).**
- **Succession Cause Number 180 of 2003,**

In the Matter of Paul Odero Oguna.

were all relied upon for the proposition that citing the wrong provisions of the law renders a suit incompetent and fatally defective.

The case of **Benja Properties Limited vs Savings & Loan Kenya Limited, HCCC (Milimani), Number 173 of 2004**, was also relied upon for the submission that the filing of the motion by way of a notice of motion instead of a chamber summons was a serious defect which went to the very root of the application. The court was therefore urged to strike out the motion.

The second limb of the objection is that the affidavit of George Ngure Kariuki filed in support of the notice of motion is incurably defective. It is submitted that the affidavit was commissioned by Regina Boisabi an advocate from the firm of Maanzo & Company Advocates, the same firm which had drawn the affidavit. The affidavit therefore contravenes Section 4 of the Oaths and Statutory Declarations Act (Cap 15).

Further, it is maintained that the affidavit of George Ngure Kariuki does not comply with Order I Rule 12 of the Civil Procedure Rules as there was no authority filed from the company authorizing George Ngure Kariuki to swear the affidavit on behalf of the Company.

In this regard the following cases were relied upon: -

- **Kenya Commercial Bank Limited v Addo & Another [2002] LLR 1905.**
- **Bunson Travel Service Limited & 9 Others vs Kenya Airways Limited HCCC No.304 of 2004.**
- **Law Society of Kenya vs Commissioner of Lands & Others [2000] LLR 1828.**

· **Paul Nganga Ndetei vs H F C K HCCC No.151 of 2003.**

It was further contended that the notice of motion filed on behalf of the Company constituted a reply to the petition and cannot be disposed of without reference to the petition. It was therefore an abuse of the process of the court and the Company would not suffer any prejudice if it is struck out as the Company can canvass the issues raised in the motion in response to the petition.

The counsel who appeared for the Company claimed the preliminary objection had just been brought to his attention and requested for time to do some research. Having earlier rejected an application for adjournment, the court declined to indulge the counsel and therefore reserved the matter for ruling. Thus it can be safely concluded that there has been no response from the Company in respect of the preliminary objection.

Having considered the preliminary objection, I am satisfied that the same raises the issue of jurisdiction which as was stated by Njagi J. in the case of **Bunson Travel Services Limited & Others (supra)** is well taken as a preliminary issue as lack of jurisdiction would lead to the court downing its tools. The question that arises is whether in bringing the notice of motion as it did the company did properly invoke the jurisdiction of the court.

A perusal of Sections 219 (e) and (8), 222, 223 and 224 of the Companies Act under which the motion was brought shows that these sections deal with the following: -

Section 219 (e) and f: - Provide circumstances in which a company may be wound up.

Section 222: Provides for powers of the court upon hearing a Winding Up Petition i.e. power to dismiss the petition, adjourn the hearing, make any interim order or any other it thinks fit.

Section 223: Provides the court with powers to restrain or stay Winding Up proceedings against a company before the Winding Up order is made. I concur with the advocate for the petitioner that these are substantive provisions which provide the substantive law applicable in dealing with the petition. Although the notice of motion was specifically indicated as also having been brought under the companies Winding Up Rules, no specific Rule was cited such that there is no specific mention of the procedural law under which it is brought. My efforts to locate any such provision in the Winding Up Rules was not successful. I can therefore safely conclude that the companies (Winding Up) Rules does not provide any such procedural law.

In **Winding Up Cause No.10 of 2003, In the Matter of Yorkhouse Properties Companies Limite.** Ringera J. (as He then was) noted that Rule 203 of the Companies (Winding Up) Rules expressly applies the existing practice and procedure of the court in all cases where the court has jurisdiction but the Companies Act or Winding Up rules have not provided a specific procedure and that the court was thereby entitled to invoke the provisions of the Civil Procedure Act and Rules made thereunder.

In the motion Order L rule 1 and 2 of the Civil Procedure Rules were cited. That order however, is not relevant to an application to strike out pleadings which ought to be brought under Order IV rule 13 of the Civil Procedure Rules. Moreover, under Rule 16 of the same order such an application ought to be brought by way of chamber summons. Having noted these anomalies, the question is whether the notice of motion dated 2nd November 2007, is fatally defective. I take the view that it is not. For Order L Rule 12 of the Civil Procedure Rules provides that although the provisions under which an application is made should ordinarily be stated, an application cannot be refused merely by reason of failure to comply with this rule.

As regards the use of a notice of motion rather than a chamber summons Rule 7 (1) of the Companies (Winding Up) Rules, provides that every application other than a Winding Up Petition shall be made by a notice of motion. Although not specifically cited, the application was properly brought under Rule 7 (1)

of the Companies Winding Up Rules. It is evident that this rule contradicts with Order VI rule 16 of the Civil Procedure Rule which provides for applications to be made by chamber summons, however, the Civil Procedure Rules only applies where there are no specific provisions under the Companies Act and Winding Up Rules. In this regard the case of ***Benja Properties Limited (supra)*** is distinguishable as it was dealing with an application under the Companies Winding Up Rules.

With regard to the second limb of the objection, it is clear from the face of the affidavit, that the affidavit of George Ngure Kariuki was commissioned by Regina Boisabi Oyaro. The annexures to the replying affidavit sworn by Sammy Mutua Makore confirm that Regina Boisabi is an officer in the firm of Maanzo & Company Advocates.

I find that the commission contravenes Section 4 of the Oaths and Statutory Declarations Act. For this reason the affidavit is incompetent and must be struck out and expunged from the record. Without the supporting affidavit the motion cannot stand.

Further, it is evident that the supporting affidavit was in effect replying affidavit to the Winding Up Petition. As submitted by the petitioner's counsel, the motion cannot be dealt with without reference to the petition. I concur with the counsel that it is the motion is an abuse of the court process. The applicant will suffer no prejudice if same is struck out.

For all the aforesaid reasons, I uphold the preliminary objection and rule that the notice of motion dated 2nd November 2007, is incompetent and an abuse of the process of the court. It is accordingly struck out.

Dated, signed and delivered this 26th day of November 2007.

H. M. OKWENGU

JUDGE