

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

Winding Up Cause 2 of 2006

IN THE MATTER OF DOGRA ENGINEERING CO. LTD

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

On 3.2.2006 Manmoham Singh Dogra (hereinafter called the Petitioner) lodged this Winding Up Cause citing various reasons in the Petition for winding up Dogra Engineering Company Limited (hereinafter called the company). When the company was served with the Petition, it appointed M/s Nyaencha Waichari and Company Advocates who filed their Notice of Appointment on 17.2.2006 and on the same date lodged a Chamber Summons seeking two primary orders that the petitioner be restrained from publishing notice of the petition pending hearing and determination of the application and that the petition be struck out or be dismissed.

On 28.2.2006 the company lodged the Notice of Motion under consideration which Notice of Motion seeks one primary order that the court does extend the time for the filing of the opposing affidavit to the petition. The motion on Notice has been brought under Rules 7 and 203 of the Companies (Winding Up) Rules Order XLIX Rule 5 of the Civil Procedure Rules and under the inherent powers of the court.

The principle grounds for the application are that although the petition was served upon the company on 9.2.2006 the resident company director needed to consult with a director who is out of the country; that the company was at the same time preparing an application for striking out the petition and in the process time for filing the affidavit in opposition to the petition lapsed and that the petitioner shall not suffer any prejudice if the application is granted.

The application is supported by an affidavit sworn by one Kartar Kaur Dogra a director of the company which is an elaboration of the above grounds. The application is opposed on the grounds that the delay in lodging the said opposing affidavit has not been explained; that the substance of the alleged consultations had not been explained; that the (Chamber Summons) application does not explain any reasonable cause to warrant the grant of the orders sought and that the application is merely intended to delay the legitimate prosecution of the winding-up cause.

I have considered the application and the submissions of counsel. I have also carefully considered the cases cited. Having done so, I take the following view of the matter. The reason given for the delay in filing the affidavit in opposition to the petition are not convincing. The company on being served with the petition lodged the Chamber Summons for inter alia striking out the petition within 8 days of service of the petition. The application is supported by an affidavit of Kartar Kaur Dogra who has also sworn the proposed opposing affidavit. The reason advanced that the said Dogra needed to consult a director who is out of the country is not satisfactory at all in this age of E-mail technology and the mobile phone. It was also not diligent to allege that the preparation and the filing of the application to strike out the petition contributed to the delay in filing the affidavit in opposition to the petition. Should I refuse the application in the light of my above findings?

I have perused the proposed opposing affidavit. I am bound to consider the same to see if it raises bonafide issues. This is in line with what the Court of Appeal said in **Trust Bank Ltd –vs- Amalo Co. Ltd [2003] 1 EA 350 at page 352.**

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit.

Their Lordships also observed at the same page as follows.

“... the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.”

In my view, the proposed affidavit in opposition to the petition seems to answer all the averments in the Petition. I do not have to analyze each and every paragraph in the proposed opposing affidavit. It is however clear that the grounds for the petition are substantially dealt with in the said affidavit. Much as I am not satisfied with the explanation for the delay in filing the said affidavit I find that the proposed affidavit in opposition to the petition raises bonafide issues that should be resolved by a consideration of the same at the hearing of the petition. I cannot also see that the petitioner would be prejudiced at all in view of the fact that the winding up cause is at its very preliminary stages.

In the result, I grant the Company’s application dated 28.2.2006 in terms of prayers 2 and 3 thereof. Prayer 3 is granted on the condition that the requisite court fees are paid.

The costs of this application are awarded to the petitioner in any event.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2006.

F. AZANGALALA

JUDGE

5.5.2006