



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

Winding Up Cause 12 of 2001

IN THE MATTER OF NAIROBI CONVEYORS LIMITED

AND

IN THE MATTER OF COMPANIES ACT

R U L I N G

When the petition came up for hearing preliminary objections were raised by the petitioner and the company.

The petitioner stated that the petition was filed on 19th February 2001 and a verifying affidavit was filed on 22nd February 2001.

That the said petition was fixed for hearing on 18th May 2001. By that date the company had been served with the petition as required by Rule 24 of The Companies (Winding up) Rules, herein after called the Rules.

That the petition was advertised in the Standard Newspaper and in the Kenya Gazette. That by those notices in the newspaper and in the Kenya Gazette, the parties who desired to appear at the hearing of the petition were given notice to file their notice to appear.

The petitioner obtained compliance certificate as per Rule 28.

That every creditor is required by Rule 29 (1) to file notice of intention to appear at the hearing of the petition. That since the petition was due to be heard on the 18th May 2001, all creditors ought to have filed their notice of appearance by 4 p.m. on 17th May 2001. By that date only four parties had so appeared in compliance with Rule 29 (2).

Following the notices filed by the aforesaid creditors the petitioner in compliance with Rule 30 filed a list of names and addresses of parties who would appear at the hearing of the petition. The petition did not proceed for hearing on 18th May 2001. After 18th May 2001, many creditors filed their notice to appear.

Petitioner stated that the subsequent notices were filed without complying to Rule 29 (3), which Rule requires leave be sought from the court, by a party who has not filed a notice, in accordance with Rule 29 (1), leave to appear at the petition. That the creditors having failed to so seek court's leave they had no locus to appear in court.

In response the creditors affected by the petitioner's objection stated that they conceded that such leave is required and each said that they will in due course seek that leave.

The company also raised a preliminary objection on the ground that the petitioner failed to attach to the petition the statutory notice in demand of the debt, served upon the company. The company submitted that without such attachment as proof of service of the notice, the petition filed is premature and ought to be struck out.

On considering the objections raised herein before, one gets the impression that the objections were brought on the spur of the moment, and without much thought.

A preliminary objection is made on pure points of law. It is made on the assumption that all the facts pleaded by the opposing party are correct and cannot, in being raised seek the exercise of the court's discretion.

Having that in mind the court find the objections raised are not true points of law. In regard to the petitioners objection Rule 29 (1) provides: -

“Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his advocate, at the address stated in the advertisement of the petition, notice of his intention to do so.”

Rule 29 (3) provides: -

“Any person who fails to comply with the provisions of paragraph (1) shall not, without the special leave of the court, be allowed to appear on the hearing of the petition.”

The petitioner argued that the creditors having failed to file a notice in accordance with Rule 29 (1) they had no right of audience before court. That argument gets defeated by Rule 29 (3) because, the court is afforded the right to accord a special leave to allow a party who has not filed a notice to appear, to indeed participate in the hearing of the petition. I do not accept that such leave can only be granted by means of an application because Rule 29 (3) does not necessarily require an application. It does seem that the court, even without an application, can grant that special leave. One would understand why such discretion would be left to the court because a notice to appear serves the purpose of notifying the petitioner who will attend in opposition or in support. It would be unjust to have a rule which is not flexible and which could lead to party, who probably got note of the petition too late, being shut out.

My finding is that the petitioners objections fails because the court has discretion under Rule 29 (3).

On the objection raised by the company the same fails for indeed the same ought to be raised at the hearing of the petition, for indeed that would be the time for evidence to be produced. That statutory notice is the petitioner's evidence in this petition and the petitioner cannot be penalised at this stage for not attaching such evidence.

It is also instructive to note that the company in its affidavit does not deny receipt of that statutory notice.

The company's objection also fails.

The court is of the view that it ought to exercise the discretion under Rule 29 (3) and to grant the creditors, who filed, their notice to appear after the date set for hearing of the petition, leave to appear.

The orders in summary are:

(1) That the preliminary objection raised by the petitioner is hereby dismissed with costs being

granted to General Motors Kenya Limited, Firestone East Africa [1969] Limited and Gab Services Limited.

(2) The company's preliminary objection is hereby dismissed with cost to the petitioner.

(3) The court hereby grants leave to all creditors who filed their notice subsequent to 18th May 2001 to appear at the hearing of this petition.

MARY KASANGO

Dated and delivered this 22nd June 2006.

MARY KASANGO

JUDGE