



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

Winding Up Cause 25 of 2005

IN THE MATTER OF INSIGHT TECHNOLOGIES LIMITED C. 56497

AND

IN THE MATTER OF THE COMPANIES ACT

PETITION BY UNPAID CREDITOR ON SIMPLE CONTRACT

RULING

The petitioners petition was fixed for hearing on 4th April 2006. On the case being called out the petitioner was absent and on the motion of the one of the opposing creditors the winding up petition was dismissed on that day at 9.25 am for non attendance.

The petitioner has moved this court by way of a chamber summons brought under Section 3A of the Civil Procedure Act, Rules 7 (2) and 11 of The Companies (Winding up) Rules.

The affidavit in support of that application is sworn by the petitioner who beings by stating “**That I make this affidavit under protest.**” It was not apparent to the court having perused that affidavit and having heard petitioner’s counsel in support what the protest was about.

The petitioner in argument and in the supporting affidavit to the present application took on a route that perhaps it ought not have been taken. But having done so the court will consider those issues.

In regard to arguments that touch on alleged contempt of court and relating to another suit Misc. Application No. 6759 of 2005, this court resists the attempts made by petitioner to drag it to that arena.

The petitioner argued that the respondent, Queensway Properties Limited, who moved the motion to dismiss the petition for non attendance, as aforesaid, had no right of audience to so move the court because it had not filed an affidavit in opposition as required under Rule 31 (1) of The Companies (Winding up) Rules. That rule provides: -

“Affidavit in opposition to a petition shall be filed within seven days of the date on which the affidavit verifying the petition is filed, and notice of the filing of every such affidavit shall be given to the petitioner or his advocate on the day on which such affidavit is filed.”

Petitioner further stated that the aforesaid respondent had no right to audience in the absence of the petitioner’s compliance of Rule 30 (1)of the Winding up Rules. That Rule provides: -

“The petitioner or his advocate shall prepare a list of the names and address of the person who have given notice of their intention to appear on the hearing of the petition, and of their respective

advocates.....”

Petitioner’s counsel argued that the list as required by Rule 30 could not be prepared since the respondent had not filed an affidavit as required under Rule 31 (1), that in the absence of that affidavit the Petitioner needed to get the court’s direction before filing the list required by Rule 30 (1).

Petitioner, on the aforesaid breaches, stated:

“That due to the foregoing the application made by counsel to the opposing creditor/respondent on 4th April 2006, was ill conceived in law and thus all consequential orders made thereon were and are irregular and should accordingly be set aside.”

In his explanation on the non attendance on 4th April 2006, the petitioner began by stating in the supporting affidavit as follows:

“That my inadvertent failure to appear before the Honourable court was occasioned by the efficiency of our courts and not tardiness on my part which nonetheless is highly regretted.”

At the tail end of the petitioner’s counsels’ submission counsel stated:

“I apologise to the court for failing to be in court on 4th April 2006 at 9.25 am.”

The reason given by the Petitioner’s counsel for his failure to attend to the hearing of this petition was that counsel was involved in another matter before the Milimani Commercial Courts, Magistrates court, in case CMCC No. 1753 of 2001, which matter engaged him up to 9.30 am that day.

The application was not opposed by counsels for the company and for a creditor Rose Nyawira Karimi.

The application was however opposed by Queensway Properties Limited. The said respondent stated that the petition was listed as NO. 14 on the cause list of 4th April 2006 to be heard at 9.00 a.m. and that counsel for the petitioner ought not have gone to the subordinate court before attending to the petition in the High court.

In opposition to the submission that the respondent had no right of audience in the absence of an affidavit as required by Rule 31 (1) respondent relied on a high court authority HC WC 46 of 1997 IN THE MATTER OF KENYA CASHENUTS Ltd and particularly quoted:

“....there was nothing in the winding up rules to justify the proposition that a company which not filed an affidavit in opposition to the winding up petition could not be heard. I took the view that a company which had not filed an affidavit in opposition to the petition could be heard on matters of law only.....in my judgment, where the company has not filed an affidavit in opposition to the petition. The petitioner must nonetheless proceed to prove the petition on the usual standard of a balance of probability and the company may, if it wises, be allowed to oppose the petition on strictly legal grounds.”

Respondent counsel stated that the absence of the petitioner on the 4th April 2006 was like the absence of a plaintiff at the hearing of a suit. In that regard respondent was of the view that the petitioner had not make out a case for the exercise of the court’s discretion, in its favour.

The court needs to consider whether indeed the respondent has no right of audience if indeed it did not have that right whether the court orders of 4th April 2006 are ill conceived in law.

It is not denied that the Respondent has not filed an affidavit as per rule 31 (1). The respondent however has filed a Notice of intention to appear on the hearing of the petition as provided under Rule 29 (1) and (2) of the winding up rules. 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.”

It does seem that under that subrule, a party may be granted special leave to appear notwithstanding the lack of a notice to appear. That subrule therefore does seem to afford to the court a discretion on appearance at the hearing of the petition. There does not seem to be any connection with right of appearance at the hearing of a petition and the lack of an affidavit in apposition in reply. I am indeed persuaded by the finding in the case of IN THE MATTER OF CASHEW NUT Ltd (Supra) and do find that the respondent did not indeed does not lack the right of audience for failure to file an affidavit under Rule 31 (1) of the winding up rules.

However, even if the Respondent did not have a right of audience, the court is of the view that such a finding would not vacate the dismissal order. In the court’s view, there was no formal application made by the Respondent and even if the Respondent had not vocalised its motion for dismissal, the court had a right to dismiss the petition for non attendance. The bottom line really was the absence of the petitioner’s counsel at court on the hearing date.

The petitioner’s argument that because it failed to file a list of names of the parties to appear at the hearing of the petition, that the Respondent had no right of audience has no basis. The Respondent was clothed with the right of audience the moment it filed a notice to appear as required by Rule 29.

The petitioner in seeking the re-instatement of the petition sought the exercise of the court’s discretion. The petitioner to benefit from the exercise of the court’s discretion needed to place reason for the court to so act. The petitioner’s counsel clearly knew that the petition was listed for hearing on 4th April. 2006. The matter was listed to be heard at 9.00 a.m. The petitioner’s counsel who knew the aforesaid chose to go to the subordinate court to deal with another matter. In other words the petitioners counsel calculated that he could attend to the matter at the Magistrates court and also attend to the hearing of the petition. The petitioner’s counsel did not explain to the court why other counsels, if there were any, in his firm did not attend to one of the matters as he attended to this petition. In any case a practice has arise where a counsel requests another to hold his brief and inform the court when he would be available to attend to the matter before court. Why did the petitioner’s counsel not follow that practice. In any case the court finds the petitioner has failed not make a sufficient case for the court to be moved to exercise its discretion to vacate its order of 4th April 2006. That being the finding of this court the application by the petitioner must fail.

The court therefore hereby dismisses the chamber summon application dated 13th April 2006 with costs being awarded to the creditor Respondent Queensway Properties Limited.

MARY KASANGO

JUDGE

Dated and delivered this 12th June 2006.

MARY KASANGO

JUDGE