



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

**Civil Case 480 of 2004**

**OMNIA FERTILIZER (KENYA) LTD. ....PLAINTIFF**

**VERSUS**

**PETER FRANCIS RUKAHU KINYA & 3 OTHERS ...DEFENDANT**

**RULING**

This Notice of Motion has been brought by the plaintiff against the defendants under Section 323 (1) (a) and Section 324 (1) of the Companies Act Cap.486, Laws of Kenya, Rule 60 (1) (a) and (b) of the Companies (Winding Up) Rules and all other enabling provisions of the Law. The applicant seeks 4 primary Orders as follows:-

**(1) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly and severally**

**do pay the applicant USD 212,959.00 together with**

**interest at the rate of 23% from 28.7.2000 until**

**payment in full.**

**(b) That the 3<sup>rd</sup> and 4<sup>th</sup> Respondents jointly and severally do**

**pay the applicant USD 212,959.00 together with interest**

**at the rate of 23% from 28.7.2000 until payment in**

**full.**

**(3) That for the purposes of giving effect to the foregoing**

**orders and declarations, an order do issue charging in**

**favour of the applicant all properties jointly and/or**

**severally owned by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

**(4) That the 1<sup>st</sup> and 2<sup>nd</sup> respondents be sentenced to**

**imprisonment for a term of two (2) years in accordance with Section 323 (3) of the Companies Act Chapter 486 of the Laws of Kenya. The grounds for Application are as follows:**

- (1) That the business of the 3<sup>rd</sup> respondent touching on the Agreement between the applicant and the 3<sup>rd</sup> respondent dated 4.2.2000, was carried on from about 4.2.2000 to 12.9.2000 by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, with intent to defraud the applicant.**
- (2) That the 4<sup>th</sup> respondents have negligently and in breach of statute misapplied, are accountable and are guilty of misfeasance and breach of trust in relation to the money and property of the 3<sup>rd</sup> respondent.**
- (3) That the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents are jointly and severally personally responsible without any limitation for all the debts or other liabilities of the 3<sup>rd</sup> respondent to the applicant.**

The application is supported by an affidavit sworn by one Charles Hurly, a Manager of the applicant. The respondents have opposed the application and have filed Grounds of Opposition, Notice of Preliminary Objection and replying affidavits of the 1<sup>st</sup> and one of the 4<sup>th</sup> respondents.

I have considered the application, the affidavits sworn in support of the application and in reply. I have also considered the Grounds of Opposition and the Notice of Preliminary Objection. Finally I have also given due consideration to the submissions made to me by the Learned Counsels appearing including the authorities quoted. Having done so, I take the following view of the matter.

I will first deal with the issue of competence and jurisdiction. Sections 323 (1) (a) and 324 (1) read as follows:-

**“323 (1) (a) if in the course of the winding up of a Company it appears that any business of the Company has been**

**carried on with intent to defraud creditors of the Company or creditors of any other person or for any fraudulent purpose, the court on the application of the official receiver or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid shall be personally responsible without any limitation of liability for all or any of the debts or other liabilities of the company as the court may direct.**

**324 (1) If in the course of winding up a Company it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager or liquidator, or any officer of the company, has misapplied or retained or become liable or accountable for any money or property of the Company or been guilty of any misfeasance or breach of trust in relation to the Company, the court may, on the application of the official receiver, or of the liquidator, or of any creditor or contributory, examine into the conduct of the promoter director, manager, liquidator or officer and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the court thinks just, or to contribute such sum to the assets of the Company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust as the court thinks just.”**

And Rule 60 (1) (a) and (b) of the Companies (Winding Up) Rules reads:-

**“60 (1) An application made to the court under any**

**of the following provisions of the Act –**

**(a) Section 324;**

**(b) Subsection (1) or sub-section (2) of Section 323 .**

**shall be made by motion, supported by affidavit.”**

It is plain to me that the above provisions apply in winding up proceedings of a company. Indeed the opening sentences of both Sections 323 (1) (a) and 324 (1) make it clear that both sections deal with matters arising in the cause of winding up proceedings of a company. And if any doubt is still being entertained, the Companies (Winding Up) rules apply to a company being wound up or a company against which proceedings to have it wound up or proceedings under Section 211 of the Companies Act have been commenced.

This suit has been commenced by a plaint under the Civil Procedure Rules. The court is therefore called upon to exercise its Ordinary Civil jurisdiction and not its winding up jurisdiction under the Companies Act. Indeed the applicant seems to have appreciated that its application invokes the court’s winding up jurisdiction. The application is “in the matter of Per pro Commodities Limited (Members Voluntary Winding Up)”. In the premises, I find and hold that this application is incompetent for having been filed in these proceedings which are not winding up proceedings of the 3<sup>rd</sup> defendant. This application is also incompetent for one other reason. The plaint was accompanied by a verifying affidavit which does not disclose the drawer thereof. I have held before that an affidavit is a document that falls under the provisions of Section 35 (1) of the Advocates Act and should disclose the firm which or the advocate who drew it. I have further held before that the omission to file a verifying affidavit together with the plaint does not automatically result in the striking out of the plaint as sub-rule 3 of rule 1 of Order VII of the Civil Procedure Rules makes the decision discretionary. The sub-rule reads:-

**“(3) The court may of its own motion or on the application**

**of the defendant order to be struck out any plaint**

**which does not comply with sub-rule 2 of this rule.**

And sub-rule 2 reads as follows:-

**“(2) The plaint shall be accompanied by an affidavit sworn**

**by the plaintiff verifying the correctness of the averments**

**contained in the plaint.”**

It is clear that the language of sub-rule (3) is permissive and it does not follow that having found that the verifying affidavit offends the provisions of Section 35 (1) of the Advocates Act, I should strike out the plaint. Exercising the discretion given in the sub-rule, I will grant the plaintiff leave to file a compliant verifying affidavit within the next 7 days if it so wishes. That in effect means that until the compliant verifying affidavit is filed the suit is incompetent. The plaintiff’s application would in the premises be founded on an incompetent plaint and would be liable to be struck out. However as I have already found that the application has been filed in the wrong court this latter finding is now academic.

In the end the application is struck out with costs to the respondents. I do not think it worthwhile to consider the other objections raised against the application as the applicant may decide to approach the court properly under the Civil Procedure Rules and any views I may have on the merits or demerits of the application if expressed now may put the Judge that will consider such application in a bind. I will

therefore express no opinion on the merits or demerits of the application.

Orders should issue as above.

**DATED** at **NAIROBI** this 5<sup>th</sup> day of December 2006.

**F. AZANGALALA**

**JUDGE**

**MARY KASANGO**

**JUDGE**