



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
Winding Up Cause 23 of 2005

IN THE MATTER OF KENYA EXCHANGE BUREAU LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

After filing the petition for winding up the company, the petitioner filed a chamber summons and appeared before the duty judge on 18th July 2005. The matter was certified as urgent and was located a date. The petitioner was ordered to serve the other director and the official Receiver.

When the matter was listed before me on 24th July 2005, the counsel for the other director, namely Anne Wanjiru Nyagah, indicated that he wished to raise a preliminary objection and then both counsel recorded a consent in the following terms; **“by consent the petitioner’s counsel to serve a copy of the petition.”** The order of the court of that day was as follows: -

“The Petition for hearing on 17th August 2005 subject to the parties complying with the vacation rules.”

On 16th August 2005 Petitioner’s counsel appeared, ex parte and informed the court that they agreed with counsel for the other director that the chamber summons for appointment of interim liquidator would be heard on 17th August 2005. The court, therefore, ordered that, that chamber summon be set down for hearing on 17th August inter partes.

On 17th August 2005, it transpired that there was no such agreement, and counsels presented the following arguments before me.

The counsel for the other director stated that he understood that what was coming up for hearing was the petition. He said that if what was to be heard was the chamber summons for appointment of interim liquidator, he had three difficulties: -

- (i) that it would be contrary to the consent of 25th July 2005;
- (ii) that he wished to raise a preliminary objection touching on the validity of the petition;
- (iii) that the other chamber summons for stay pending arbitration which ought to be heard first.

Counsel relied on the case HC W/C NO 30 of 2003; JOHNSON MBUGUA MUGO AND OTHERS VERSUS DOMINIC KINUTHIA MUGO, where Hon Justice Ibrahim faced with a winding up petition

drew the following caution.

“For this court to order the appointment of a Receiver and for such a Receiver to be the interim liquidator, the court must not have any doubt as to the validity of the petition. It would be quite risky to appoint a Receiver cum – interim liquidator when there are serious disputes on the capacity of the petitioner to lodge this petition. If such orders are given and then it is found at the end of the petition that the petition was invalid as some of the petitioners had no locus standi, then the consequences could be grave for all concerned.”

Counsel for the other director requested the court to also apply the caution of Hon Justice Ibrahim.

Counsel for the petition opposed the course of hearing suggested herein before. Counsel submitted that the counsel for the other director did not require the sanction of the court to file a preliminary objection or an application challenging the petition. He further stated that what ought to be heard first is the chamber summons for appointment of interim liquidator and at such hearing the counsel for the other director could in reply raise the issue of the validity of the petition.

On whether the application for stay pending arbitration, should be heard first, petitioner’s counsel stated that under Order 50 rule 14 of the Civil Procedure Rules, the petitioner’s application since it was filed before the other was deemed as having priority. Further he said that the Arbitration Act section 7 affords the court power to grant interim relief, which is what was sought by the petitioner.

Those in brief were the arguments placed before me. On the petitioners argument that Order 50 Rule 14, the application filed first get priority, I find that, that rule does not give priority as argued.

That rule provides:

“All applications, whether by motion, summons or other process, shall be deemed to have been made when the motion, summons or other process was filed in court.”

It is clear that rule does not have anything to do with priority, it is to do with when an application is deemed to have been made.

In considering which application ought to be heard, I believe what ought to be heard first, is the preliminary objection, being raised by the other director on the validity of the petition.

In reaching that decision I am respectfully guided by the caution of Hon Justice Ibrahim in the case of JOHNSON MBUGUA MUGO & OTHER – VERSUS – DOMINIC KINUTHIA MUGO (supra). I am in agreement with the judge that it would be of grave consequence if orders were made on a petition, which later was to be found to be invalid. I am also guided by a court of Appeal decision in the case: MURRI – VERSUS MURRI [1999] 1 EA 212 where the judges of the court of appeal, in hearing appeal from the High Court, on matter where a winding up petition was struck out, for being an abuse of the court process; the judges of appeal found as follows: -

“Summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable.”

Indeed before orders are made, which orders would be hinged on the petition it is imperative that the court does hear arguments on whether that petition is or is not valid.

I am also of the view that it also imperative that the other director’s chamber summons dated 15th August 2005, for stay pending Arbitration ought to be heard before the court embarks on hearing the application for the appointment of interim liquidator.

The court indeed accepts the petitioner's counsels arguments that the other director did not necessarily require the court's sanction to file a preliminary objection. The action of failing to file that objection has led to a delay in this matter. I will therefore require that a date be taken at the reading of this ruling for the argument of the preliminary objection.

It is so ordered.

Dated and delivered this 22nd day of August 2005.

MARY KASANGO

JUDGE