REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Winding Up Cause 34 of 2004

ERIC CAIRNS HANNA ……...…PETITIONER

AND

INTERNATIONAL HOMES LTD & OTHERS

GEN. (RTD) JACKSON KIMEU MULINGE ……...…..…RESPONDENT

RULING

The application before me was filed by the respondent to these winding-up proceedings, pursuant to the provisions of Rule 7(1) of the Companies (Winding-Up) Rules. By this application, the said respondent (who will for the purposes of this application, hereinafter be cited as the applicant), sought four substantive orders, as follows;

(i) Restraint on the Petitioner from advertising the Petition filed on 8th November 2004, and also from taking any further proceedings in the petition.

(ii) Striking out of the Petition on the grounds that it was an abuse of the process of the court.

(iii) Stay of further proceedings in this Petition until the application was determined.

(iv) Costs of the application.

When the application came up for hearing, the applicant was represented by Mr. Owino Opiyo and Mr. Munyasia, whilst the respondent was represented by Dr. John Khaminwa.

At the outset, the applicant's counsel notified the court that they had abandoned prayer 2; and that they would only limit themselves to prayer 1. In other words, the application proceeded solely on the premise that the respondent should be restrained from advertising the winding-up Petition.

The application was supported by two affidavits of Gen. (Rtd) Jackson Mulinge, and one affidavit of Ben

Munyasya, advocate.

From the supporting affidavits, as well as the Replying Affidavit of Eric Cairns Hanna (the Petitioner) it is evident that apart from these winding-up proceedings, the company is also faced with **Winding-Up Cause No. 38 of 2004,** wherein the petitioner is Gen. (Rtd) Jackson Kimeu Mulinge.

When canvassing the application, the advocate for the applicant pointed out that on 2nd September 2005, there was an advertisement in the Kenya Gazette, to the effect that the Petition herein was scheduled for hearing on 19th September 2005. That advertisement was said to have been misleading as the Petition which had been scheduled for hearing on 19th September 2005 was Winding-Up Cause No. 38 of 2004; and not the Petition herein.

Following the advertisement in the Kenya Gazette, the applicant fears that the petitioner will next cause the Petition to be advertised in the local daily newspaper, as a precursor to the hearing thereof. It is for that reason that this application was brought, with a view to stopping any such further advertisements, as the applicant believes that if the further advertisements are carried in the local daily newspapers, that would cause irreparable loss to the company.

At present, the applicant is in possession of the company, and he says that he has injected over Kshs.10 million into it, since July 2002. If the Petition was advertised any further, the applicant says that he risks the loss of all the money he put into the company. He explains that when he filed the other winding up case **(Winding –Up Case No. 38 of 2004),** he sought the alternative remedy to the winding-up of the company. He says that he sought, in the said other cause, the opportunity to buy out his co-director cum co-shareholder, so that he could continue to run the company.

In the meantime, the applicant wishes to have an auditor calculate the money which the petitioner would be entitled to, so that he can pay him off. Until that can be done, the applicant asks that this court should stop further advertisements of the Petition, for that would only accelerate the death of the company.

In response to the applicant, the petitioner submitted that the issues that go into the merits of the Petition itself were not relevant to the application herein.

He pointed out that the Petition herein was filed on 8th November 2004, whilst the Petition in Winding –Up Cause No. 38 of 2004 was filed on 21st December 2004.

Thereafter, in compliance with rule 23 of the Winding –Up rules, the Petition was gazetted on 2nd September 2005. The said rule 23 provides as follows:

"Every petition shall be advertised for at least seven days before the hearing as follows –

(a) Once in the Gazette, and at least in one newspaper circulating in the district where the registered office, or principal; or last known principal place of business, as the case may be, of the company is or was situate, and in such other or additional newspaper as is directed by the court; and

(b) Such advertisement shall state the date on which the petition was presented and the name and address of the petitioner and of his advocate, and shall contain a note at the foot thereof stating that any person who intends to appear at the hearing of the petition, either to oppose or support it, must send notice of his intention to the petitioner or his advocate, within the time and manner prescribed by rule 29, and an advertisement of a petition for the winding-up of a company by the court which does not contain such a note shall be deemed to be invalid:

Provided that, if the petitioner, or his advocate, does not within the time prescribed by these Rules, or within such extended time as the registrar may allow, duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard

shall be cancelled by the registrar and the file shall be closed unless a judge or the registrar shall otherwise direct."

In the light of the foregoing rule, the applicant is right to expect that the Petition should soon be advertised in at least one newspaper, with a circulation in Nairobi. The reason why the advertisement would have to be advertised in a newspaper with a circulation in Nairobi is because the Petition cites the company's registered office as being situate at Parklands Road, Nairobi.

As the law requires the petitioner to have the Petition advertised both in the Kenya Gazette, as well as in a local newspaper, the petitioner reckons that the court ought not to restrain him from complying with the legal requirements. It is submitted that if the court did issue an order restraining the petitioner from advertising the Petition in the newspapers, the court would be put into disrepute.

In the circumstances now prevailing, (following the advertisement in the Kenya Gazette), the petitioner contends that the only remedy available to the applicant would be to seek to review or quash the advertisement in the Gazette. Until and unless the said gazette notice was quashed or reviewed, the petitioner's view is that he ought to be allowed to take steps to comply with the law, by having the Petition advertised in the newspapers.

The petitioner says that as he had lodged complaints which were embodied in the Petition, he should be allowed to have it advertised so that the Petition can thereafter proceed to hearing. He cites **JITENDRA BRAMBHATT –VS- DYNAMICS ENGINEERING LIMTED [1982 – 88] 1 KAR 1001** as authority for the proposition that winding-up petitions should be allowed to proceed to hearing so that the questions in dispute could be resolved.

It is true that the Court of Appeal did express the following view at page 1014 of the law report;

"Having considered all the submissions on behalf of the appellant/petitioner and on behalf of the respondent company, it is my view that this is a petition which ought to have been heard and that the parties should have had an opportunity to have the disputed questions of fact resolved."

Those views were expressed by the appellate court when determining an appeal from the decision by the superior court judge who had struck out the winding-up petition, on the ground that alternative remedies were available to the petitioner. The main reason why the superior court had been persuaded to strike out the petition is that it believed that the petitioner had been actuated by malice. Hancox J. A. (as he then was) quoted, with approval, the following words of Buckley L J in **BRYANSTON FINANCE LTD. –VS- DE VRIES (NO. 2) [1976] ALL E.R. 25 AT 33;**

"The learned judge, rightly in my opinion, thought that a petition could not be an abuse simply because the petitioner was actuated by malice. If a petitioner has sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, maybe antagonism to some person or persons cannot, it seems to me, render that ground less sufficient. If on the other hand, he has no sufficient ground, his petition will be an abuse, whether he be actuated by malice or not."

I have re-cited the foregoing words because I believe that they are very applicable to the applicant's own position in this matter. His position is largely to the effect that the petitioner was actuated by malice, to either wind-up the company or otherwise make money, undeservedly by extracting the same from the applicant or from the company.

As the principle reason for seeking an injunction, to restrain the petitioner from advertising the petition was that the petitioner was actuated by malice, it would appear that that is not reason enough, as prima facie, motive is irrelevant to the winding-up proceedings, if the petitioner otherwise has a legitimate ground.

And as the petitioner and the applicant have filed affidavits in which they have stated "facts" which do not tally, it may be best that the issues are put to the test, by way of the petition being heard. And, the

next step, which is mandatory, in the process leading up to the said hearing is the advertisement in the newspapers.

When the court asked the applicant's advocate how long the injunction order was to remain in place, as the same is not specified in the application, he said it should be until such time as the petitioner would have the opportunity to advance his case, during the hearing of the Petition. Now, in that answer lies the answer to this application. If the petitioner were to be restrained from advertising the Petition in the newspapers, he would be unable to comply with the provisions of rule 23 of the Winding-up rules. Therefore, the Petition could not proceed to hearing, as the advertisement was a prerequisite to the hearing. In effect, the petitioner would never get round to advancing his case "at the hearing of the Petition".

In the circumstances, I hold the view that the grant of a restraining order would imply that the Petition would never get to the stage of hearing. In other words, the interim order would actually have a permanent effect on the Petition, making it impossible to resolve the matters in dispute in this cause. That would, in my view, cause extreme prejudice to the petitioner, as he would be deprived of his legal right to a hearing in the Petition.

Finally, the applicant indicated that his main desire is to preserve the assets of the company, so that he could, in due course have the opportunity to buy-out the petitioner, after the latter's financial rights had been determined by auditors. It was the applicant's view that he should be given the opportunity to explore the alternative remedies available under Section 222 (1) of the Companies Act. The said sub-section reads as follows;

"(1) On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets."

Now, even though the court may have the discretion to make any interim order, or any other order that it thinks fit, such orders are to be made "on hearing a winding-up petition". Therefore, even if this court wanted to be of assistance to the applicant, within the confines of legality, the orders for the alternative remedies could only be made at the hearing of the petition. Therefore, an order to restrain the advertisements in the newspapers cannot lie, as without the said advertisements, the cause would never get to the stage of hearing, when the court could then grant or decline to grant the alternative remedies.

Accordingly, I hold that the application dated 22nd November 2004 is not merited. It is therefore dismissed with costs to the petitioner.

But I would also suggest to the parties herein to seriously consider the consolidation of the two winding-up petitions. And in the meantime, there cannot be any bar to the two prime movers in the company consenting to a court appointed auditor, to verify the company's financial standing as well as the extent to which each of them may either owe the company or otherwise be owed by the company.

Dated and Delivered at Nairobi this 29th day of November 2005.

FRED A. OCHIENG

JUDGE