



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

**Winding Up Cause 8 of 2003**

**IN THE MATTER OF GILANI BUTCHERY LTD**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**RULING**

The applicant/respondent herein basically applies for orders, inter alia, that the court order issued on 9<sup>th</sup> December, 2003 dismissing the applicant company's application dated 5<sup>th</sup> June, 2003 be set aside. The application is brought by way of a chamber summons dated and filed in court on 17<sup>th</sup> December, 2003. It is brought under Rules 5(2) and 203 of the Companies (Winding up) rules, Order IX B rule 8 of the Civil Procedure Rules and under the inherent powers of the court.

On the same date that the application was dated for hearing, to wit, 22<sup>nd</sup> December, 2003, the advocates for the petitioner filed a Notice of Preliminary Objection. It was to the effect that at the hearing of the Respondent's application dated 17<sup>th</sup> December, 2003, counsel for the petitioner would raise a preliminary objection on the ground that the application is incompetent as the Civil Procedure Act and Rules do not apply to petitions under the Companies Act.

At the hearing, Mr. Nyakundi, holding brief for Mr. Kariuki for the petitioner, argued that the application dated 17<sup>th</sup> December, 2003 is incompetent as it is brought under the Civil Procedure Rules which are not applicable to winding up proceedings. He contended that Civil Procedure Rules apply to civil suits, whereas the Companies (Winding Up) Rules apply to winding up petitions. Consequent upon this phenomenon, he argued, the inherent powers of the court cannot be invoked in the face of the winding up rules as the latter are a complete code unto themselves as far as winding up procedure is concerned, Therefore, he maintained, this court has no jurisdiction to grant the orders sought in the application dated 17<sup>th</sup> December, 2003, As a parting shot, he referred the court to page 2 of the Ruling of Ole Keiwua J., as he then was, in Winding Up cause No.5 of 1991, in Re Savannah Development Company Limited, (UR) and also to page 2 of Osiemo, J's ruling in RE KENWOOD TRADING COMPANY LIMITED, Winding Up cause No.22 of 1997 (UR).

In opposing the preliminary objection, Mr. Musangi for the petitioner stated that the face of the application is very clear. It shows that the application is made under Rules 5(2) and 203 of the Companies (Winding Up) Rules. Even if reference to OIX R. 8 of the Civil Procedure Rules were to be dropped altogether, the application could still proceed competently under Rules 5(2) and 203 of the Companies (Winding Up) Rules which are cited.

Secondly, Mr. Musangi continued, in the event that there is a gap in the Companies (Winding UP) Rules,

then at common law we would be constrained to fall back to the Civil Procedure Rules. There is no specific provision in the Winding Up Rules for reinstating an application which has been dismissed. In such an event, we fall back on the Civil Procedure Rules, he maintained. He concluded by stating that the authorities cited by Mr. Nyakundi relate to those situations in which the applicants cited only the enabling provisions of the Civil Procedure Rules, omitting those in the Companies (Winding Up) Rules. The upshot is that those authorities cannot apply to the application before the court, and therefore the preliminary objection has no substance and should be dismissed.

In a short reply, Mr. Nyakundi stated that neither under the Act nor under the rules does the court have jurisdiction to set aside a dismissal order. He therefore urged the court to dismiss the application.

The preliminary objection raised herein is premised on only one ground that "the application is incompetent as the Civil Procedure Act and Rules do not apply to petitions under the Companies Act." I subscribe to the proposition that the Civil Procedure Act and Rules do not apply to winding up petitions under the Companies Act as a statement of principle. It is amply supported by the authorities which were cited by learned counsel for the petitioner. As Justice Ole Keiwua, as he then was, said in his ruling in RE-SAVANNAH DEVELOPMENT COMPANY LIMITED, winding up cause No.5 of 1991 (Supra, UR) -

"...the Civil Procedure Act and Rules do not apply and cannot be invoked in a winding up petition which is governed by the provisions of the Companies (Winding Up) Rules."

This position was applied and followed by Justice Osiemo in RE KENWOOD TRADING COMPANY LIMITED, winding up cause No. 22 of 1997 (supra, UR). In both cases, the court was dealing with preliminary objections similar to the one before this court. And in both cases, as in this one, the court was dealing with applications in winding up causes. In both cases, the preliminary objections were successful. A closer look at the head of each of those applications gives a better insight as to why the preliminary objections succeeded.

In RE KENWOOD TRADING COMPANY LIMITED (supra), the application which was the subject of the preliminary objection was made-

"Under O. L. Rule 1, Order 1 Rule 10 (2) of the Civil Procedure Rules and S.3A of the Civil Procedure Act."

Even though the main suit was a winding up cause, it is obvious that the application therein was based exclusively on Civil Procedure Rules, and since the Civil procedure Act and Rules do not apply and cannot be invoked in a winding up petition, which is governed by the special Companies (Winding Up) Rules, the application could not stand and had to be struck out.

Similarly, in RE SAVANNAH DEVELOPMENT COMPANY LIMITED, the application which was the subject of the preliminary objection was made-

" Under section 3A of the Civil Procedure Act, O.XXXIX rules 2,3 and 5 of the Civil Procedure Rules, O.V1 Rule 13 (1) (a) (b) and (d) of the Civil Procedure Rules, inherent jurisdiction of the court, the winding up rules and all enabling provisions of the law."

As in RE KENWOOD TRADING COMPANY LIMITED, apart from a casual reference to "the Winding Up Rules", this application was made practically under the Civil Procedure Rules. Reference therein to "the Winding Up Rules" without specifying the actual rules upon which the application was based was not sufficient and did not help matters. It does not stand in any different light from an application in a civil suit which is stated as being made "under the Civil Procedure Rules." Such an application cannot stand. It is imperative that the specific order and rule or rules under which an application is made should be stated. Similarly, in a Winding Up Cause, it is not enough to base an application on "Winding Up should be stated, and since these were not stated, it follows that the application was grounded upon the Civil Procedure Rules which were specified therein. However, by reason of the fact that the Civil

Procedure Rules do not apply and cannot be invoked in a winding up petition, the application was incompetent and had to be struck out.

In the instant case, the application before the court is made under-

"Rules 5(2) and 203 of the Companies (Winding Up) Rules, O. IXB rule 8 of the Civil Procedure Rules and under the inherent Powers of the Court."

If the applicant herein had stopped at the Companies (Winding Up) Rules and omitted altogether reference to the Civil Procedure Rules, I don't see that any preliminary objection would have been raised. Conversely, if the application had been grounded exclusively on Civil Procedure Rules, the court would not have hesitated to order the striking out of the application. But where an application is grounded partly on the Companies (Winding Up) Rules, and partly on the Civil Procedure Rules, as in this application, the success or otherwise of the preliminary objection will depend, in my view, on whether or not the application can be sustained by the winding up rules cited at the head of the application. If it can stand on such rules, I think it would be prudent to strike out reference to Civil Procedure Rules and allow the application to proceed.

In the application before the court, having cited and predicated the application under Rules 5(2) and 203 of the Companies (Winding Up) Rules, the applicant need not have strayed to Civil Procedure Rules. That was totally unnecessary. If reference to the Civil Procedure Rules is struck out, the application would still be propped up by the Companies (Winding Up) Rules. But, if the application is struck out altogether, then the court will have failed to give meaning and effect to those provisions of the Companies (Winding Up) Rules under which the application is partly founded.

In the circumstances, I think it would be very harsh and oppressive to strike out this application altogether. While I do not wish to condone reference to irrelevant rules, I think that the interests of justice in this matter will be served better by striking out reference to the Civil procedure Rules, and allowing the application to proceed with the applicant confining itself to the rules cited under the Companies(Winding Up) Rules. For these reasons, the preliminary objection fails, but for the same reasons, costs will be in the cause.

It is so ordered.

Dated and delivered at Nairobi this 15<sup>th</sup> day of January, 2004.

L.NJAGI

JUDGE