

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

WINDING UP CAUSE NO. 42 OF 2000

IN THE MATTER OF RUAHA CONCRETE COMPANY LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

R U L I N G

On 15th May 1998, the court did strike out Defendant's defence and entered judgment for the Plaintiff as prayed in the Plaint together with costs. This order was on 23rd October 2001 set aside and the order setting it aside stated inter alia as follows:

"The sum total of all the above is that I do allow the application to set aside the exparte orders granted on 15th May 998 and order the Chamber summons dated 27th October 1997 to be fixed for hearing. However the Applicant is ordered to pay all costs thrown away and costs of this application within 30 days of the same being agreed upon or being taxed if not agreed upon. If the same costs is not paid as herein ordered then the Defence will remain struck out. In short the order setting aside the order of 15th May 1998 is subject to all thrown away costs being paid as above".

During the hearing of the application filed by the Defendant which resulted into the above order the learned counsel for the Defendant Mr. King'ara in his address to me stated inter alia as follows:

"We are willing to pay all costs thrown a way".

The Plaintiff pursuant to the order of 15th May 1998 did amongst other things get itself substituted as a Petitioner in the Winding Up cause No. 42 of 2000 and filed an Amended Petition in which it stated at paragraph 5 as follows:

"The Company is indebted to your Petitioner in the sum of K.shs 4,644,415.00 being the decretal amount due by the Company in the High Court of Kenya at Nairobi Civil Case No. 4348 of 1993 together with further interest at 12% p.a. on K.shs 3,910,271.05 from 1st September 1999 until payment in full".

The amended petition was occasioned as can be seen directly by the judgment entered on 15th May 1998 which was eventually set aside upon payment of all thrown away costs. The Petition was part of an action intended to execute that decree. The expenditure from the time the application of substitution of the Petitioner was made to the time the judgment in HCCC No. 4348 of 1993 (Milimani HCCC No. 997/2001) was set aside was in my humble opinion expenditure that would now be thrown away because of the setting aside of the judgment. Mr. King'ara did, as is clear from the record accept that his client would pay the same. He now says that they did pay the same costs but that court did not order that the winding costs be paid. It is true, I did not specifically order the costs of the winding to be paid as that was not then before me but it is also true that these are costs that resulted directly from the judgment which has now been set aside. Mr. King'ara also referred me to Rule 29 of the Winding Up Rules and maintained that the joinder into the petition was prematurely done as the Plaintiff did not comply with

Rule 29 of the Winding Up Rules. My only answer to that is that the application dated 22nd November 2000 which sought substitution was before court on 1.12.2000 when Mr. Owino is on record as having represented the company. In his presence and with his consent that application was by consent of all parties adjourned to 31.1.2001. On 31.1.2001 that application was granted. The Company was not present nor its advocate notwithstanding that Mr. Owino took the date in court. Mr. Karanja for the then Petitioner did not object subject to the then Creditor (Plaintiff here) paying to the Petitioner shs. 10,000/-. In short the point Mr. King'ara is raising now should have been raised on 31.01.2001 when the present Plaintiff was being substituted as the Petitioner. They did not raise the same and have not applied to set aside the order that was made on that day. It was a valid court's order and so the Plaintiff is the substituted Petitioner in that petition.

I do find that the Defendant in HCCC 997 of 2001 which was the alleged debtor in HC WC42 of 2000 should pay the costs of that Petition from the time the Plaintiff was substituted the Petitioner to the time the order setting aside the judgment in HCCC 997 of 2001 (Central Registry HCCC 4348 of 1993) was delivered, the same being costs thrown away. As this was not raised at the proper time, I will not grant any costs for the attendances before me for this purpose. Orders accordingly.

Dated at Nairobi this 5th day of February 2002.

ONYANGO OTIENO

JUDGE