



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION- MILIMANI**  
**WINDING UP CAUSE NO. 21 OF 2005**  
**IN THE MATTER OF KENYA BUS SERVICES LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT**  
**RULING**

The Applicant filed Certificate of Urgency Application dated 17<sup>th</sup> October 2019 under certificate of urgency and sought the orders;

- a) That the Court had already ruled that there be a stay of execution in view of the pending winding up petition;
- b) That the further orders were also issued without the full facts being presented to the court in particular;
  - i) The issue of a Notice to show cause as to why the petition should not be dismissed was heard and determined by Lady Justice Ng'etich.
  - ii) That Lady Justice Ng'etich also ordered the petitioner to formally withdraw the petition to enable other interested creditors take over.
- c) That it is disingenuous for Mr. Nyamu advocate for the decree-holders in **ERC 68 of 2006** to have informed the court on 7<sup>th</sup> August 2019 when he was not acting for the petitioner, that it was not interested in the proceedings and that the notice to show cause should have reissued especially as the issues had already been determined by Lady Justice Ng'etich.
- d) That in the ruling of 7<sup>th</sup> August 2019, this Court had already ruled that by virtue of **Section 225 of the Companies Act** (repealed) there can be no attachment after winding up proceedings have been commenced and these orders were still in place pending determination of the winding up petition.

The application was based on grounds;

1. That the further orders issued on 7<sup>th</sup> August 2019, to that effect, were granted after a ruling had been delivered and without a formal application for review or a Notice of Appeal being filed.
2. That the Court had already ruled that there be a stay of execution in view of the pending hearing of the winding up petition;
3. That the further orders were also issued without the full facts being presented to the Court in particular;
4. That the issue of a Notice to Show Cause as to why the petition should not be dismissed was heard and determined by Lady Justice Ng'etich;
5. That Lady Justice Ng'etich also ordered the Petitioner to formally withdraw the Petition to enable other interested Creditors take over.
6. That it is the Ruling of 7<sup>th</sup> August 2019, this Court had already ruled that by virtue of **Section 225 of the Companies Act** (repealed) there could be no attachment after winding up proceedings have been commenced and these orders were still in place pending determination of the Company's Application dated 20<sup>th</sup> May 2019,

7. That the Applicant was not aware of the further orders issued by the court on 7<sup>th</sup> August 2019 until the orders were extracted on 9<sup>th</sup> October 2019 and the same did not correspond with the ruling.

8. That the interim injunctive orders issued by the court should stay in place until determination of the winding up petition.

### **GROUNDS OF OPPOSITION**

The Application was opposed by the Transport & Allied Union, a Creditor herein on the following grounds;

- a) That the application was a non-starter lacking merit, scandalous and abuse of court process;
- b) That the Applicant herein was ably represented by Counsel when the Court made directions;
- c) That the Court has power and discretion to manage cases before it and to issue fresh notice to show cause why any suit should not be dismissed for want of prosecution.
- d) That the Petitioner herein having lost interest in the matter and lost interest in the case, this Court cannot sustain the same at the instance of the company;
- e) That the application was meant to sustain the Petition herein with the ulterior motive of ensuring that the company continues to benefit from the shield provided by **Section 225** of the **Companies Act, cap 486** Laws of Kenya (repealed)an act which amounts to an abuse of court process.

The decree holder in **ELRC 68 of 2006, Secretary General of the Transport & Allied Workers Union**, by affidavit filed in opposition to the Petition on 28<sup>th</sup> October 2019 deposed as follows;

- a) He opposed any scheme by any Creditor to take over the conduct of these proceedings as no other Creditor demonstrated interest to prosecute the matter and the Winding up petition has been pending since 2006.
- b) On 17<sup>th</sup> October 2018, the Petitioner expressed its intention to withdraw the petition with no orders as to costs.
- c) He was/is aware that the Petitioner namely BP Kenya ceased to carry out business in Kenya and therefore it cannot sustain the Petition since it does not reside within the jurisdiction of the Court.
- d) The Company is keen to sustain this Petition as a shield/buffer against Creditors which is an abuse of Court process and for that reason the Petition ought to be dismissed.

Counsel for the Decree holders of **ELRC 68 of 2006** confirmed by affidavit of service of 28<sup>th</sup> October 2019 and copy of Daily Nation of 24<sup>th</sup> October 2019 that all creditors were served through substituted service.

### **ORAL SUBMISSIONS**

The Applicant through learned Counsel Mr. Singh stated in a nutshell as follows;

- a) The Company faces a winding up petition and the reasons for delay were explained before Lay Justice Rachel Ngetich after issuance of NTSC
- b) LJ Ngetich granted orders for the Petitioner o file application to withdraw the Petition for Winding Up.
- c) This Court made a determination of the Preliminary Objection and after the Court gave the Ruling it became *functus officio*.
- d) The Court took evidence from the Bar that the Petitioner was no longer interested in the petition for Winding up.
- e) Mr Nyamu learned Counsel representing the decree-holders was not Counsel for the Petitioner.
- f) If any application was filed it ought to have been served on the other party and is/are given the right to reply in writing before the same is heard before Court.
- g) The Court has wide latitude in instances of review and may exercise discretion.
- h) There cannot be any execution while there is a stay in place until hearing and determination of the Winding up petition.
- i) If the Applicants are interested they can take over the Petition.
- j) If the Court leaves the orders as they are it would allow attachment of the Company's assets and it shall be illegal.

k) The only recourse by an aggrieved party is by invoking **Order 45 Rule 1(3) CPR 2010** on review or lodge an appeal in the Court of Appeal.

The Respondent through learned Counsel Mr Nyamu submitted as follows in a nutshell;

- a) On 7<sup>th</sup> August 2019, learned Counsel for the Company was ably represented by Mr. Daniel Kiragu advocate and he swore a supporting affidavit to the instant application of 17<sup>th</sup> October 2019.
- b) After this court delivered Ruling on the Preliminary Objection on 7<sup>th</sup> August 2019, the Winding Up petition was to be set for hearing, and therefore he was justified in persuading the Court to issue directions in order to expedite the hearing of the Petition.
- c) That all that was said in court was recorded in the Court file and the Court granted orders
- d) The Petitioner was not in court or represented; the other Creditors save for the decreeholders were the only ones in Court
- e) Counsel for decreeholders spoke on behalf of the decreeholders and he was entitled to do so and he sought from the Court directions. That is why the Court granted directions that the petitioner to appear in court on 28<sup>th</sup> October 2019 or show cause why the Petition would not proceed for hearing.
- f) What transpired in Court is not an issue of/for review of Court orders under **Oder 45 CPR Rules**.
- g) This is an old case dating back from 2006 and has the plight of 746 workers who have waited since then, for satisfaction of the decree.
- h) He relied on the Oxygen principle **Section 1A 1B & 3A CPA & Order 17 (2) CPR 2010 & Article 159 (2) (d) COK 2010**.
- i) Despite the Petitioner being granted orders by the Court LJ Ngetich in October 2018 to file an application for withdrawal, no act has been under taken by the Petitioner todate.
- j) The only party keeping the matter alive and is busy is the Company yet the Company did not file the Winding up petition. Reference has been made to other Creditors and none of them have come to court.
- k) The Court in its inherent jurisdiction and judicial discretion granted the impugned orders to expedite the hearing of the Petition.

## **APPLICANTS SUBMISSIONS**

### **THE LAW**

The Applicant submitted that the parameters on who may lodge a review application as well as how that application is to be determined, are set out under **order 45 rule 1 of the Civil Procedure Rules**, which provides that:

*“1. Any person considering himself aggrieved-*

*a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*

*b) By a decree or order from which no appeal is hereby allowed, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.”*

**Section 80 of the Civil Procedure Act** provides as follows;

#### **Section 80 review**

*“Any person who considers himself aggrieved-*

*a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*

*b) By a decree or order from which no appeal is allowed by this Act, May apply for a review of Judgment to the Court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”*

Going into the grounds for reviewing a judgment or decree of a court, Supreme Court of India in the case of **Afit Kumar Rath –vs- State of Orisa & Others** (a Supreme Court cases) 596 at page 60;

*“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which states in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used on Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.”*

The Applicant submitted that Mr. Nyamu lacked *locus standi* to make any application on behalf of the petitioner;

**Order 9 rule 1** of the **Civil Procedure Rules** is in following terms:

*“1. Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on this behalf.”*

The provision of **order 9 rule 1** limits applications, acts or appearances authorized by law to be done by a party “*except where otherwise expressly provided for by any law for the time being in force...*” who are recognized agents and/or advocates.

That this provision is not a technical requirement of procedure but one that goes to the root of the capacity of the recognized agent/advocate. No party should presume to act or appear before the court without first being duly appointed.

Counsel for the decreeholders relied on oral submissions only and opted not to file written submissions.

### **DETERMINATION**

This Court considered the written and oral submissions of Counsel on behalf of parties with regard to the application of 17<sup>th</sup> October 2019.

The Court shall address the matter as follows;

1. The Court vide Ruling of 7<sup>th</sup> August 2019 dismissed the Preliminary Objection and upheld **Section 225 Companies Act (repealed)** that grants stay of all forms of execution pending hearing of Winding up petition.
2. The Court ordered hearing of the Winding up petition on a date to be obtained in the Registry in the New Term.
3. The Proceedings of 7<sup>th</sup> August 2019 are on record. The Court after reading the Ruling was moved by parties with reasons to give directions on expediting the hearing of the Winding up petition.
4. The Court granted directions on 7<sup>th</sup> August 2019 as follows; the petitioner to appear in Court on 28<sup>th</sup> October 2019 or NTSC would issue. All creditors were to be served directly or by substituted service and the interim orders granted on 10<sup>th</sup> June 2019 pending hearing and determination of the application of 20<sup>th</sup> May 2019 would lapse on 28<sup>th</sup> October 2019. The matter could be heard in any Court within the Division.
5. The Court is guided by the law as found in the Constitution and other legislation. **Articles 48; access to justice, 50; right to fair hearing & 159(2) COK 2010** which provides; all are equal before the law irrespective of status and matters shall be heard without undue delay among other requirements.

The Court is bound by **Section 1A 1B & 3A OF CPA**;

*“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

**1B. Duty the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;**

**3A. Saving of inherent powers of court.**

***Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for***

*the ends of justice or to prevent abuse of the process of the court.”*

From these provisions the Court on its own motion or by application by a party to these proceedings is entitled to apply and the Court to grant orders/directions on expediting the matter at hand. Counsel for the decree holders applied to Court on behalf of his clients; directions to expedite hearing of the Winding up petition. The Counsel for the Company objected the Court found basis to expedite the matter as its Ruling of 7<sup>th</sup> August 2019 that parties take a hearing date from the Registry was not complied with, hence the orders.

On the NTSC it is on record that a NTSC was issued before LJ Ngetich and on 18<sup>th</sup> October 2018; the court granted orders for the Petitioner to file application to withdraw the petition. To date, the Petitioner has not complied with the Court order nor appeared or been represented in Court proceedings. As at the time the application was made 7<sup>th</sup> August 2019 almost a year had passed since the Orders of LJ Ngetich were granted in October 2018. The NTSC was to be issued on 28<sup>th</sup> October 2019 if the Petitioner did not appear in Court. There is no legal bar provided in **Order 17 CPR 2010** to issuance of another NTSC; if there is unexplained and continued delay in prosecution of the matter; 1 year thereafter of the NTSC already issued if the matter has not proceeded for hearing.

With regard to the allegation that the Counsel for decree-holders spoke from the Bar and on behalf of the Petitioner and yet he was not the Petitioner’s legal representative, the Court notes with concern that in the absence of the Petitioner BP Company Ltd, both Counsel for the Company and the decree holders have spoken on the Petitioner’s position according to the court record yet none of the counsel represents the Petitioner. Secondly, the oral submissions made by Counsel for the decree holders have now been reduced in an affidavit annexed to grounds of opposition it is no longer stated from the Bar. The claim that the Petitioner folded its business and relocated and is not within the Court’s jurisdiction has not been controverted by any other evidence.

There is no error on the face of the record to warrant review or vacation of the orders of 7<sup>th</sup> August 2019. The Court upon application by Counsel on behalf of a party to these proceedings gave directions to expedite the matter. I have not made substantive orders to prejudice any party’s rights, the only pending matter is to canvass the petition. **Section 222 of Companies Act** (repealed) provides;

***(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.***

**Section 225**

***“Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.”***

The court notes that stay of execution provided in **Section 225 Companies Act (repealed)** is not equivalent to stay of proceedings. **Section 225 of Companies Act (repealed)** only refers to dealing with Company assets and not stopping Court proceedings of the Winding up petition.

#### **DISPOSITION**

- 1. Finally, the orders of 7<sup>th</sup> August 2019 granted after the Ruling were interim orders/directions with expiry dates of 28<sup>th</sup> October 2019. They were/are spent.**
- 2. The application of 17<sup>th</sup> October 2019, is dismissed with costs.**
- 3. Parties/Counsel to comply with Court order of 7<sup>th</sup> August 2019 that parties/Counsel take a hearing date of the petition from the Registry.**
- 4. In the meantime under Section 225 Companies Act (repealed) no attachment, distress or execution shall take place pending hearing and determination of the winding up petition.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 18<sup>TH</sup> FEBRUARY 2020.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. J.SINGH & MS D. KIRAGU FOR THE COMPANY**

**N/A FOR THE PETITIONER**

**MR. TUPET – COURT ASSISTANT**

**MR. SINGH:** We request for leave to appeal and certified copies of the Ruling

**COURT:** The Counsel is granted leave to appeal.

**M.W.MUIGAI**

**JUDGE**

**18<sup>TH</sup> FEBRUARY 2020**

**MR. SINGH:** Pursuant to the court Ruling of today, we need a substantive order that the execution is stopped as per the law Section 225 of Companies Act (repealed) until the winding up petition is heard. We are not representing the Petitioner but we would want an early date for hearing of the Petition and who will serve the other Creditors

**COURT:** The Court Ruling of 7<sup>th</sup> August 2019 remains in force that all execution is stopped by virtue of **Section 225 of Companies Act** (repealed).

The hearing of the winding up Petition shall be after when the parties have undertaken Case Management before Deputy Registrar Commercial & Tax Division on 10<sup>th</sup> March 2020 and further mention in court on 17<sup>th</sup> March 2020 with a view to take a hearing date.

**M.W.MUIGAI**

**JUDGE**

**18<sup>TH</sup> FEBRUARY 2020**