



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL&ADMIRALTY DIVISION
WINDING UP CAUSE NO. 16 OF 2008
IN THE MATTER OF SWAN MILLERS LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA
RULING

1. What remains to be determined in the Notice of Motion dated 30th June, 2016 are prayers (c), (d) and (e) which seeks:-

c. The Judgment of the Court delivered on 11.2.2015 and the orders issued by the Court arising from the said judgement and any consequential orders that have arisen from the judgement be and are hereby set aside.

d. The Petitioner petition dated 10.7.2008 be and is hereby set down for hearing upon notice to all parties to the proceedings.

e. The costs of this application be provided for.

2. The Judgement sought to be set aside is that of Gikonyo J. dated 11th February 2015 in which he made an Order of Winding up Swan Miller Limited (hereinafter the Company). The Petition to wind up the Company had been opposed by Kabansora Limited (Kabansora) which is the Applicant herein. Kabansora is a shareholder and contributor of the Company and had voiced its opposition through an Affidavit sworn by Simeon Nyachae on 12th September 2008 and filed on 17th September 2008.

3. In an Affidavit sworn by Emmanuel Wetangula on 30th June 2016 in support of the current application, he depones that the hearing of the Petition and the delivery of Judgement proceeded in the absence of Kabansora or its Advocates and without Notice to them.

4. Counsel Wetangula gives a chronology to the events, from his point of view. The matter which was due for hearing on 18th July 2014 was stood over to 26th September 2014. On 26th September 2014 the matter was adjourned to be mentioned 3rd November 2014. There was no Court Appearance on behalf of Kabansora as Mr. Wetangula had erroneously diarized the mention for 21st November 2014 and not 3rd November 2014. Anyhow, on that mention dated of 3rd November 2014, the Court set down a further

mention date of 18th November 2014.

5. That the firm of Mohamed Mungai who were on record for Kabansora were not served for the Court Session of 18th November 2014 and did not therefore not attend Court. Counsel depones that from the Court Record the Court session of 18th November 2015 somehow metamorphosed into a hearing. In the proceedings of the day, the parties present confirmed that they had filed their respective submissions upon which Judgement was reserved for 11th February 2015. Indeed, come 11th February 2015 Judgement was delivered as scheduled, again, in the absence of representation for Kabansora as their advocates has not been notified.

6. The Application is opposed by the Official Receiver and Keti Investments Limited (Keti) (the Petitioner herein).

7. The Court will determine this matter on a narrow but what it considers to be a crucial point.

8. Counsel David Ochieng Oyatta represents Keti and on 8th July 2016 swore an Affidavit in opposition to the Application for setting aside. In paragraph 22 and 26 of his Affidavit he depones:-

22. THAT further thereto and without prejudice to the foregoing, the deponent has not shown that he made any efforts whatsoever to remedy his apparent mistake once he found out that he had recorded the wrong mention date. The Applicant took no action between 21st November, 2014 (which date he apparently believed to be the correct mention date) and the date for set for judgement which was more than 2 months later. The Applicant's inaction, coupled by his failure to put in his submissions within the prescribed time or at all his failure to bring this Application promptly demonstrate the Applicant's lack of interest in the matter.

9. Judgement herein was delivered on 11th February 2015 and the present application was filed on 30th June 2016 some 16 months late. For sure, there was considerable delay.

10. The Official Receiver underscores the issue of delay and posits that there would be no good explanation why the Application was not brought earlier as Kabansora would have been aware of the Winding up order soon after the delivery of Judgement.

11. Judy Mugo, a State Counsel in the office of the Official Receiver swore an Affidavit on 24th October 2016 pursuant to the Winding up Judgment of 11th February 2015, an order was extracted and issued by Court on 5th March 2015. Counsel depones that via a letter of 15th April 2015, the Directors of the Company were notified of the Winding Up Order. That letter is copied to the Advocates for Keti. Something will be said about this later in the decision. Subsequently the Official Receiver gazetted the Winding up Order and called for a meeting of Directors through letters of 22nd March 2015 and 21st August 2015. Copies of all the letters were annexed to her Affidavit.

12. That the Directors failed to attend the meetings or to file a Statement of Affairs of the Company forcing the Official Receiver to file an application seeking to compel the Directors to file the Company's Statement of Affairs.

13. Back to the Counsel for Keti. He depones as follows in paragraph 27 of his Affidavit:-

"The application is clearly an afterthought maliciously and frivolously crafted to give credence to the Applicant Company's failure to attend to meetings called by the Official Receiver to correspondence from the Official Receiver and failure on their part to provide the relevant Company Documents and Statement of Affairs to the Company for purposes of Liquidation".

This is an assertion that the Application is brought in bad faith.

14. In the face of these accusations it would have been expected that Kabansora would respond to the issue of delay. Instead a Statement in respect to the delay was made from the Bar when their Advocates in further written submissions stated:-

“The delay in filing the present application was also not only by the fact that the Applicants’ Advocate had no knowledge of the fact that the matter had come up in court on two occasions without notice; but also occasioned by the inability to trace the file, which only became available after a complaint was lodged by the Applicants Advocate”.

In the same submissions the Court was asked to find it curious that the letters of the Official Receiver were only copied to the firm of Oyatta& Associates for Ketiand not the other Counsels on record.

15. There is no doubt that the delay of 16 months in bringing the current Application is considerable. And even without prompting, it was incumbent upon the Applicant to explain this delay. The Applicant did not.

16. Worse still, when the issue of delay was brought up, the Applicant did not proffer an explanation by way of evidence. Instead it was contented with an explanation made by its Counsel from the Bar. That is not evidence. And let me demonstrate why such evidence was vital. The Official Receiver deponed that it informed the Directors of the Company about the Winding up Order in a written communication that was made as earlier as 15th April 2015. This would be just two months after the Judgement. A copy of that letter was shown to Court.

17. In the Affidavit in opposition to the petition filed by Kabansora, Mr. Simeon Nyachae states that he is a Director of both Kabansora and the Company. There is no evidence that this has changed. Whilst it is true that the letter of 15th April 2015 was only copied to the Advocate for Kite, there was no denial by Mr. Nyachae who was a Director of Kabansora and the Company that he did not receive the letter of 15th April, 2015 or those of 20th May 2015 and 21st August 2015.

18. The Court takes the view that the delay of 16 months is considerable and as it has not been explained then it is also inordinate. Further, that an explanation of the delay was all important because the Respondent had argued that the Application was brought in bad faith and hence its timing. This needed to be debunked by the Applicant. But it made no effort. Given my view of the matter, the Court is unable to hold in favour of the Applicant even if it were to believe that it was not notified of the hearing and judgement dates and would otherwise have been entitled to the Orders as a matter of course.

19. The application of 30th June 2016 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 11th day of May, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Murithi h/b Gathu for Creditor

Mungai h/b for Wetangula for Applicant

Ondati h/b for Oyatta for Petitioner

N/A for Official Receiver

Alex - Court Clerk