



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 10 OF 2014
IN THE MATTER OF SPENCON HOLDINGS LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA
RULING

1. The **Chamber Summons** application before the court dated 28th August, 2014 is filed by Spencon Holdings Limited “**the Company**” and seeks the following orders:-

- 1. That this Application be certified urgent and be heard ex parte in the first instance;*
- 2. That pending the hearing and determination of this application inter-partes, the Petitioner, Richfileds International Company Limited, by itself, its agents, its servants, advocates or any of them or otherwise howsoever, be restrained from publishing and/or advertising the notice of the Petition in this cause whether in the Kenya Gazette and/ or in any newspaper published in Kenya and/or other publication to any person.*
- 3. That the Petitioner, Richfileds International Company Limited, by itself, its agents, its servants, advocates or any of them or otherwise howsoever, be restrained from publishing and/or advertising the notice of the Petition in this cause whether in the Kenya Gazette and/ or in any newspaper published in Kenya and/or other publication to any person.*
- 4. That the Petition herein be struck out and/or dismissed;*
- 5. That the costs of the said Petition including costs of this application be provided for.*

2. The application is premised on the grounds set out therein, and is supported by affidavit of **Patrick Nderiutu** sworn on **28th August 2014**, and his supplementary affidavit sworn on **3rd October 2014**.

3. In brief, the Applicant's case is that the Applicant Company, **Spencon Holdings Limited**, is not in any way indebted to the Petitioner in the sum claimed or any other sum or any part thereof. The documents filed by the Petitioner indicate that, the alleged debt the subject of these winding up proceedings, if at all there is any, is owed by an entity known as **Spencon Kenya Limited**. Although **Spencon Holdings Limited** and **Spencon Kenya Limited** are related, the two companies are distinct and separate legal entities. The Petition is therefore an abuse of the process of court in that it relates to a nonexistent debt from Spencon Holdings Limited, the Applicant Company. The Petition is filed malafides with the sole motive of vexing and embarrassing the Applicant Company and the same ought to be struck out with costs. The Petition is in any event incurably defective in that it was lodged pursuant to an incompetent winding up notice. The Petition does also not comply with Rule 25 of the Companies (Winding Up) Rules. The Applicant Company is solvent and fully able to pay all its legitimate debts.

4. The application is opposed by the Petitioner vide a supporting affidavit of **Daula Mohamed Omar** sworn on **19th August 2014**, and his further affidavit sworn on **21st May 2014**. The Respondent's case is that The Petitioner filed the present Petition last year on 21st August 2014. Seven (7) days later, on 28th August 2014, the Company filed the present Notice of Motion application dated 28th August 2014, seeking orders that the Petition by struck out and/or be dismissed. Eight (8) days later, on the Petitioner filed a replying affidavit opposing the said application. Approximately one month later on 3rd October 2014, the Company filed its supplementary affidavit in response to the contents of the said replying affidavit. Subsequently, the Company

requested the Petitioner to forbear from prosecuting the Petition in consideration of the Company arranging for the payment of the debt that forms the subject matter of the Petition. The Petitioner acceded to the said request. Pursuant to the said compromise, the Petitioner has been paid the principal sum. The Petitioner has demanded payment of the interest and penalties charged by the bank on account of the delayed or late payment of the debt which sums have yet to be paid. The said interest and penalty is the actual loss incurred by the Petitioner as a consequence of the Petitioner forbearing from suing the Company and/or its associates from the time when the debt accrued on the promise or undertaking made to the Petitioner that the said interest and penalty will be paid as part of the debt. There is now produced and shown to me marked as exhibit 'F' a true Photostat copy of the letter dated 23rd January 2014 written to the Petitioner by Spencon Kenya Limited, a wholly owned subsidiary or associate of the debtor herein as evidence to confirm the above facts. As stated in paragraph 9 of my said replying affidavit filed herein on 4th September 2014, the Applicant herein confirmed in writing to the Petitioner its undertaking to pay the debt that forms the subject matter of this Petition.

5. Parties filed submissions which I have considered.

6. The brief background to the application is as follows. By a Petition dated 19th August 2014 and filed herein on 21st August 2014 the Petitioner, Richfields International company Limited petitions this court to wind up the company Spencon Holdings Limited on account of insolvency having failed to pay the Petitioner's debt amounting to Kshs.33,943,503/= as at 30th June 2014. That is the Petition that the current application seeks to strike out on the grounds set up in the application.

7. Although parties have set out the issues for determination in this matter, the only issue which would determine the matter, as far as I am concerned, is whether or not the alleged debt exists, and is owed by the company. I have perused the documents "B", "C" "D" and "E" annexed to the affidavits of Daula Mohamed Omar in support of the Petition. These documents refer interchangeably to Spencon Holdings Limited and Spencon Kenya Limited. The Applicant herein, Spencon Holdings Limited, contends that it is not in any way indebted to the Petitioner in the sum claimed or at all. It is the Applicant's position that the alleged debt, if any, is owed to the Petitioner by an entity known as Spencon Kenya Limited. Reference was made to annexure marked "B" on the Petitioner's verifying affidavit. That annexure is a letter dated 16th January 2014 written to Fidelity Bank, by Spencon Kenya Limited, in which it acknowledged owing Kshs.28,456,472/= to the Petitioner. However, the Petitioner's position is that these two companies are related and as correspondences show, Spencon Holdings Limited is the holding company for Spencon Kenya Limited. Personally, I am persuaded that these two companies are related, and the undertaking to pay the debt which was given by Spencon Kenya Limited was given in good faith to cover the debt owed by Spencon Holdings Limited. So in my view, if the issue before the court was simply an issue of debt owed, the Petitioner's case cannot be in doubt. However, the Petition seeks for an order to wind up the company. An Order to wind up a company, literally speaking, is the same as a death penalty for human being. It cannot be substituted for another company in much the same way that an order for death penalty for a person "A" cannot be visited on person "B". The law does not allow one person to die for the wrongs of another. In the same way, a winding up order must target a defaulting company. It cannot be visited on an associated company. The order winding up a company in essence kills the company. A company which has not committed any wrong cannot be wound up for the wrong of the other. In this particular instance, the Petitioner claims the same debt both from the company, and from Spencon Kenya Limited. In the circumstances, it is the finding of this court that the debtor is not sufficiently ascertained to warrant an order of winding up against the company. The other issue raised by the Applicant is that the Petition herein is incurably defective for failing to comply with Rule 25 of the Companies (Winding Up Rules).

Rule 25 of the Companies (winding-up rules) provides that:-

"Every Petition shall be verified by an affidavit, which shall be sworn by the Petitioner, or by one of the Petitioners if more than one, or, where the Petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the Petition is presented, and such affidavit shall be prima facie evidence of the contents of the Petition."

That provision is in mandatory terms. The Verifying Affidavit should be filed within four (4) days after the Petition has been filed. In this case, the verifying affidavit was filed contemporaneously with the Petition and was in any event sworn before the Petition was presented. The verifying affidavit was sworn on 19th August 2014 and the Petition was presented/ filed in court on 21st August 2014. From the wording of rule 25, it is clear that the verifying affidavit should not be sworn before the petition has been presented otherwise the Petitioner is rendered fatally defective and should be struck out. See the decision in ***Re Kanini Farm Ltd*** W.U No. 19 of 1998 (UR)

8. For the foregoing reason, the Chamber Summons application dated 28th August 2014 succeeds with the result that the Petition herein is hereby struck out. The costs of the said Petition and of this application shall be for the Applicant.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF DECEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s. Opio h/b Njeru for Company

Mr. Geetanda h/b for Ohenga for Petitioner

Teresia – Court Clerk