REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

WC CASE NO 18 OF 2007

UNICONSULT (KENYA) LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

INTRODUCTION

1. The Company's Notice of Motion application dated 15th August 2012 and filed on 24th August 2012 was brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The same sought the following orders:-

i. **The Order which was made on the 11th day of November 2009 be reviewed.**
ii. **The costs of this application be in the cause**.

2. The grounds under which the said application was premised were as follows:-

a. **On 11th November 2009 this Honourable Court ordered *inter alia* that the Winding Up Petition herein be heard by oral evidence.**
b. **The said Order was made pursuant to a mistake or constituted an error apparent on the face of the record because there was no provision in the Companies Act Cap. 486 Laws of Kenya or any other law for Winding Up Petition to be heard by oral evidence at the expense or to the exclusion of the Petition itself and Affidavits in support and opposition thereof.**
c. **If the said Order was allowed to stand, the Court would be proceed to hear the matter through an illegal procedure, which was contrary to the intention, spirit and letter of the law**.

AFFIDAVIT EVIDENCE

3. The application was supported by the affidavit of John Mbau Mburu, an advocate practising in the firm representing the Company in the proceedings herein.
4. The deponent deposed that a few days to the hearing scheduled for 11th November 2009, his firm was served with a Bundle of Documents by the Petitioner's advocates. On the day the matter came up for hearing, the Petitioner was sworn with a view of adducing oral evidence. He stated that

although he objected to the said procedure, the court nonetheless ordered that the matter proceed by way of *viva voce* evidence.

5. It was the deponent's averment that the Petitioner had misled the court to proceed by oral evidence to introduce new documents that the Petitioner had not annexed to the Affidavit in support of the Petition herein.
6. In addition, he pointed out that the Company decided not to appeal against the said order. He was, however, categorical that it would be a gross miscarriage of justice to go through the entire hearing following a procedure that was not provided by the law. He said that the Company was ready to go on with the hearing but insisted that the correct procedure had to be followed.
7. On its part, the Petitioner filed its Notice of Preliminary Objection dated 27th September 2012 on 28th September 2012. The Petitioner argued that the entire application was fatally defective, misconceived, superfluous, incompetent and statute barred by the doctrine of *res judicata* in that:-

a. **The application raised a materially similar issue of law touching on the legal propriety of the directive of this Court on hearing the Petition by *viva voce* evidence, which issue had already been canvassed before this Court when dealing with a previous materially similar application presented by the company and dated 1st December 2010.**
b. **This Court, had by its ruling delivered on 28th June 2012, conclusively adjudicated upon that issue, amongst other materially similar procedural technicalities.**
c. **There was no error or mistake evidence on the face of the record in view of the Ruling of this Court made on 28th June 2012.**
d. **There was no new material that has been laid down before this Court by the Applicants so as to warrant the exercise of the Court's judicial discretion to review the Order of 11th November 2009 otherwise properly given in view of the complexity and the contentious nature of the subject matter.**
e. **The Company had not at all demonstrated any prejudice or injustice it was bound to suffer were it to proceed with the hearing of the Petition though *viva voce* evidence.**
f. **The application served no useful legitimate purpose other than to abuse the process of this Honourable Court.**
g. **The application offended the mandatory overriding objectives of this Court to timely expeditious, affordable and just resolution of disputes before it as was expressly laid down in Section 1A and 1B of the Civil Procedure Act, Rules 202 and 203 of the Companies (Winding Up) Rules and Articles 159 (2) (b) and (e) of the Constitution of Kenya, 2010.**
h. **Such other and/or further grounds as shall be adduced at the hearing hereof.**

LEGAL SUBMISSIONS BY THE COMPANY

8. In its written submissions dated 26th August 2013 and filed on 28th August 2013, the Company submitted that it had brought the application herein under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010 which provides as follows:-

"1. (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 or 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....."**

9. It contended that Section 62 of the Evidence Act Cap 80 (laws of Kenya) provided that **"all facts, except documents may be proved by oral evidence"** and that oral evidence must in all cases be

direct as stipulated under Section 63 of the Evidence Act.

10. The Company therefore argued that a petition brought under the provisions of Section 221 (1) of the Companies Act did not envisage an oral hearing as under Rule 25 of the Companies (Winding Up) Rules (hereinafter referred to as the Rules) the affidavit verifying a petition for winding up shall be *prima facie*, evidence of the contents of the said petition. It submitted that there was neither a provision in the Companies Act or the Rules for a petition to be heard by oral evidence. It was the Company's submission that a petition should be heard by way of affidavit evidence as in Judicial Review Proceedings.
11. It referred the court to **Halsbury's Laws of England 4th Edition Volume 7(3) at page 470** that indicated that the court would **rarely make an order for cross-examination of deponents to affidavits in relation to a disputed winding up petition** (emphasise Company's). Its argument was that **"since the court can seldom hear evidence by way of cross-examination of a deponent in a contested matter, it cannot be expected to hear a whole winding up petition by oral evidence**," failure to provide adequate evidence in the verifying Affidavit would mean that a petition must fail.
12. Further, the Company argued that Rule 203 of the Rules relied upon by the Petitioner was not applicable herein as there were clear provision in the Companies Act and the Rules and consequently the ordering of the Petition to proceed by way of oral evidence was an error apparent on the court record that required to be remedied.
13. The Company also submitted at length on the fact that its application was not rendered *res judicata* by the ruling that was delivered on 28th June 2012 by the learned Musinga J (as he then was). It averred that the issue was not of similar issues between the previously instituted suit or proceedings but rather that they are directly or substantially the same. It therefore argued that the principle of *res judicata* was not applicable herein as the issues herein were different.
14. It was the Company's submission that the application for review was brought timeously and that the suit was still in progress.
15. It relied on the cases of **Re: Lundle Brothers Ltd (1965) 2 All ER, Re: Cuthbert Cooper and Sons Ltd ALR Annotated (1937) Vol 2, Nyamogo and Nyamogo vs Kogo [2001] EA 173, Said Mbwana Abdi vs Muhami Koja Civil Appeal No 31of 2010** (unreported) and several excerpts from the **Halsbury's Law of England** to support its case.
16. On its part, the Petitioner filed its written submissions dated 24th June 2013 on the same date. The said submissions were also in respect of the Interested Parties Notice of Motion application dated 25th July 2012 which the Interested Party withdrew and were therefore no longer applicable herein.
17. The Petitioner argued that the grounds for review had not been expressly stated on the face of the Company's application and that it did not meet the minimum legal threshold for the grant of review because no new material or evidence or any other sufficient reason had been laid before the court. The Petitioner also said that the Company was guilty of laches for having filed the application more than two (2) years since the order was made.
18. The Petitioner contended that the Company had not demonstrated prejudice or any substantial injustice resulting from the order that had been given because the Company was entitled under the law to cross-examine the Petitioner and therefore challenge the evidence produced at trial.
19. It was the Petitioner's further submission that the matter was *res judicata*, Musinga J having held that the court was not satisfied that the defects or irregularities referred to be the Company would occasion any injustice to the Company and the Interested party. The Petitioner therefore said that the Company was therefore statute barred from re-opening the issue on the legal property of the said order in the proceedings herein.
20. In addition, the Petitioner argued that Koome J invoked the provisions of Rule 203 of the Rules which empowered the court to adopt practises, procedures and regulations of the court to fill gaps to address issues which were not ably provided for in the Rules.
21. The Petitioner urged the court to consider Article 159 and Sections 1A and 1B of the Civil Procedure Act Cap 21 (laws of Kenya) which mandate the court to exercise its discretionary powers devoid of any procedural technicalities that may hinder the attainment of the objectives to act justly, fairly, proportionately, expeditiously and affordably and dismiss the Company's application as from the way it was framed, it served no useful purpose than to abuse the processes of the court with a view to stalling the hearing of the petition.

22. Both the Petitioner and the Company orally highlighted their written submissions. In response to the Petitioner's submissions the Company's counsel orally emphasised that the present application was not *res judicata.*

LEGAL ANALYSIS

23. The Court has carefully considered the oral and written submissions by the parties, through their respective counsel, and the case law submitted herein and wishes to point out right at the outset, that the submissions from a section of page 17 to page 27 of the Company's submission are not relevant in the determination of its application for a review of the orders of Koome J (as she then was). This is because the same related to alleged conduct by the Petitioner's counsel in the handling of the matter. The court will therefore not bear the same in mind while making a decision herein.
24. What is of concern to this court is whether or not the Company was able to demonstrate that it was entitled to a review under Order 45 of the Civil Procedure Rules, 2010.
25. The main ground that the Company relied upon was that there was an error apparent on the face of the record. A perusal of the court proceedings of 11th November 2009 shows that Koome J (as she then was) was very much alive to the orders that she was granting. Before she gave out her directions contained in her order of 11th November 2009, she stated as follows:-

> ***"It seems the directions as to the hearing was not given in this matter. I give the following directions....."***

26. It does appear to this court that the learned Koome J made a conscious decision to give the said directions for the hearing of the Petition herein. The question now that arises is whether or not she had power to do so and/or whether or not she acted within the law when she did so.
27. Counsel for the Company argued that the procedure for hearing petitions was by way of affidavit evidence as Rule 25 of the Rules alluded to the verification of the petition by an affidavit. It stipulates as follows:-

"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 <u>such affidavit shall be prima facie evidence of the contents of the petition</u>". (emphasise Company's)

28. The court wholly concurs with the Company that the Petition has to be verified by an affidavit but disagrees with its submissions that the Petition can only be heard by way of affidavit evidence. Indeed there is nothing in the Companies Act or the Rules that seems to suggest that the hearing of a petition must only be by way of affidavit evidence.
29. Taking this argument further, Order 4 Rule 2 and Order 7 Rule 5 of Civil Procedure Rules, 2010 refers to an affidavit to verify the facts of a Plaint and Counter-claim respectively. Nowhere in the said Orders is it stipulated how the hearing will be conducted, yet it is common knowledge that oral evidence is adduced in the hearing of a suit.
30. Notably, under Order 2 Rule 8 of Civil Procedure Rules, 2010, there is alluded the giving of evidence in chief in an action for libel and slander. If the court were to accept the Company's argument in this regard, it would therefore mean that Order 4 Rule 2 and Order 7 Rule 5 of Civil Procedure Rules, 2010 did not contemplate the hearing of suits by way of oral evidence and that all suits should be heard by way of affidavit evidence as the two (2) orders did not specifically refer to an oral hearing.
31. This court takes the firm view that how a hearing is to be conducted is the domain of the Evidence Act Cap 80 (Laws of Kenya) unless it is specifically stated in any statute or law.
32. Evidently, the excerpt from **Halsbury's Laws of England (supra) at page 367 paragraph 470** relied upon by the Company states that **<u>rarely</u>** (emphasis mine) will a court make an order for cross- examination of deponents. This does not mean that a court can never and should never order such cross-examination. The use of the word **"rarely"** connotes that there are circumstances

where the court can order such cross-examination.

33. This court is therefore not persuaded by the Company's submissions that no oral evidence can be adduced in a contested petition. The hearing of Judicial Review proceedings by way of affidavit evidence would not entirely displace the court's jurisdiction to hear oral evidence if it deemed the same to be necessary to meet the ends of justice. As was rightly pointed out by Counsel of the Petitioner, Article 159 of the Constitution of Kenya, 2010 expressly mandates a court to determine a matter without having due regard to procedural technicalities.
34. In her wisdom, Koome J (as she then was) directed that parties give oral evidence. Perusal on Rule 203 of the Rules clearly gave her the mandate to direct the procedure of the proceedings herein. The said Rule provides as follows:-

"In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these Rules, the practice, procedure and regulations in such proceeding shall, <u>unless the court otherwise directs</u> (emphasise mine), **be in accordance with the rules and practice of the court"**.

35. There is no provision as to the manner in which the hearing of a petition ought be conducted both in the Companies Act and the Rules. The learned Koome J (as she then was) was therefore correct when she gave directions regarding the oral hearing and did not in any way depart from the rules and practice. "**Unless the court directs**" connotes that a court can direct the procedure of proceedings.
36. If on the other hand there were specific rules and practice that petitions for winding up ought to have been exclusively by way of affidavit evidence, she would have been completely out of line which would have led credence to the Company's assertions that there was an error apparent on the face of the record.
37. In the event the court were to be wrong on this point, it would still get solace from the provisions of Section 202 of the Companies Act which stipulates as follows:-

> ***"(i) <u>No proceedings under the Act or these rules shall be invalid by reason or any formal defect or irregularity</u>***(emphasise mine) ***unless the court before which objection is made to the proceeding is of the opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of the court."***

38. This court is not sitting on appeal as the order the Company seeks to review was made by a court of similar competent jurisdiction. The role of this court therefore would be merely to establish whether or not there was an error apparent on the court record. It would be a different case if the court was satisfied or was of the opinion that substantial injustice had or will be occasioned by the order of the court made on 11th November 2009 that the Petition herein proceed by way of oral evidence.
39. The court also finds that the Company would not suffer any prejudice or substantial injustice if the matter herein proceeded by way of oral evidence. Indeed after the court gave its directions on 11th November 2009, it did extend orders on 29th January 2010 when parties were expected to file their respective documentation as the Company had not done so. Again as was rightly pointed out by Counsel for the Petitioner, the Company was entitled to discredit the evidence adduced by the Petitioner during cross-examination.
40. Similarly, counsel for the Company was right on point when he pointed out that the court cannot go outside the petition. The case of **<u>Re: Lundle Brothers Ltd</u>** (Supra) that it referred to had set out the correct position of the law. It does not matter how many documents a party adduces as evidence, it must prove its case. In this case, the documents to be relied on by the Petitioner to prove its case must prove what is contained in the Petition. The Petitioner cannot introduce a new case by relying on additional documents.
41. In other words, the Petitioner cannot introduce new facts that were not verified by the affidavit envisaged under Rule 25 of the Rules in a bid to bring a new case in a roundabout way. If the Petitioner were to do so, the court would not consider the same. It is the duty of the court to

consider the admissibility, relevance, materiality and weight of evidence that a party adduces. The Company herein does not therefore have to worry as it can discredit the Petitioner's evidence during trial.

42. Having had due regard to all the circumstances of this case, this court has come to the conclusion that there was no error apparent on the record and that a court can hear a petition for winding up by way of oral evidence as was directed by the learned Koome J (as she then was) and that the mode of hearing of the Petition directed by the court did not and has not caused any substantive injustice to the Company. The court therefore finds favour with the Petitioner's submissions in this regard.
43. This court has considered the Company's Notice of Motion application and it did not find the same to have been *res judicata* as had been submitted by Counsel for the Petitioner. Whereas the learned Musinga J (as he then was) did consider the aspect of procedural technicalities, the same was in respect of the Company's Notice of Motion application dated 1st December 2010 seeking to strike out the Petition herein dated 20th November 2007. The orders sought herein were for a review of the orders of the learned Koome J (as she then was) made on 11th November 2009.
44. The court did not find it necessary to consider whether or not the Company's present application was filed timeously as the court did in fact find that the Company did not demonstrate to the court that it had proven the substantive ground for review cited in Order 45 of Civil Procedure Rules, 2010.

DISPOSITION

45. The court hereby upholds nos (c), (d), (e), (f) and (g) of the Petitioners Notice of Preliminary Objection dated 27th September 2012 and filed on 28th September 2012.
46. For the foregoing reasons, this court finds that the Company's Notice of Motion application dated 15th August 2012 and filed on 24th August 2012 to have been devoid of any merit and was spurious. In the circumstances foregoing, the said application is dismissed with costs to the Petitioner.

47. Orders accordingly.

DATED and **SIGNED** at **NAIROBI** this 14th day of March 2014

J. KAMAU

JUDGE