

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 28 of 1995

**In the matter of Clive Lee Private Safaris Ltd and In the Matter of The Companies Act
(CAP 486)**

Ruling.

The court records show that on 20th November, 1995, one James P.T. Foster, a Chairman and Director of the Company known as Clive Lee Private Safaris Ltd, petitioned the court to wind up the Company following a resolution passed on 11th August 1995 to the effect that,

“on account of accumulated losses and the Company’s inability to pay its debts, it was resolved that the shareholders do immediately petition the court to wind up the company...”

Soon after the petition, an application for injunction was filed on 20th December 1995, seeking various restraining orders against one Barry Clive Aldine Lee, the Managing Director of the Company, who was also responsible for the day to day running of the Company.

I heard the application the same day, ex-parte. In his submissions Mr Kibet for the petition submitted that the Respondent Barry had resigned from the company on 13th July, 1995 yet he was now trying to use the Police to get back company assets, particularly a vehicle No 954 PUF a Landrover Turbo, a property of the Company. I was referred to an affidavit sworn by the same Respondent Barry Clive Lee, dated 11th December 1991, in which this vehicle was listed as one of the Company assets. This affidavit is not part of the petition herein, but seems to have been sworn to some authority to allow the vehicles to be brought into Kenya. From these submissions, I granted prayers 2 and 3 of that application ex-parte.

Later on the 14th March, 1996, the Respondent, Ltd Col Barry Clive Aldine Lee filed a Notice of Motion seeking to have the petition struck out. He also sought an order to strike out the Notice of Motion filed on 20th December 1995, and finally, he sought a further order to have the ex-parte injunction orders granted on 20/12/1996 be discharged.

The application was opposed vide grounds of opposition and a replying affidavit, both dated 15th March 1996, filed by Mr Kibet, advocates.

Both advocates representing the parties herein consented to have the application decided by way of written submissions which they both filed. These now form part of the court record.

I have record the application and the supporting affidavit, sworn by Michael Owuor, Counsel for the applicant. I have also once again read the petition, the averments in the affidavit supporting the application of 20/12/1995, the grounds of objection and the affidavit of Patrick Mwangi Gichira, a Certified Public Secretary who has been associated with Company since its inception, and is obviously familiar with the Company.

I have also read the written submissions by both parties. From all this I find that members resolved on the 11th August 1995 at an Extra Ordinary General Meeting of the members that

“That shareholders should immediately petition the court to wind up the company”, that despite this Resolution to petition the court, the members through their advocate Messrs Kibet and Co, advocates published a Notice in the Kenya Official Gazette of the 26th January 1996 headed, “Members voluntary

winding up”.

I find this notice to have been both misleading and or false because it gave the impression, especially to creditors that the Company was solvent, yet the minutes of the meeting of the 11th August 1995 clearly showed that the Company had “accumulated losses and was unable to pay its debts...”

Section 276 (1) of the Company’s Act, Cap 486 Laws of Kenya

des that there should be, “a statutory declaration of solvency in case of proposal to wind up voluntarily.” This was not done in this case.

The petition filed in this court on 20th November 1995, prayed that the Company be wound up by the court, and according to the provisions of section 226 (2) of the Company’s Act, the proceedings should have been deemed to have commenced “at the time of the presentation of the petition for the winding up.” In such a case therefore, an interim liquidator should have been appointed by the court and this is the person who should have made applications for injunctions etc etc and not a Director / or shareholder as was done in this case. To this extent therefore the injunction application filed was defective and or invalid. I granted the injunction order ex-parte, as the facts presented to me at that time now appear not to have done conclusive. The injunction order I granted was therefore granted in error, and I proceed to vacate it.

From the facts and submissions presented to me by both parties I find myself in agreement with the submission that the petition filed in court is full of irregularities. There was no proper resolution to wind up the Company, as I have already stated before. If the court was to wind up the Company, then it would have been the court to appoint up the liquidator, not the Company. Because of this, I find that the liquidator was not properly appointed.

I have considered the provisions of Rule 202 (1) of the “The Company’s (winding) up Rules” which talk of “Formal defect not to invalidate proceedings”.

I find the defect in this petition not to be formal but substantial in that the advertisement in the Official Gazette aforesaid was deceitful and misleading to the creditors particularly as the available evidence shows that the Company is insolvent. This defect and or irregularity cannot be cured by this court, with the result that I must strike out the petition with costs. The parties concerned are however at liberty to file a fresh petition. Because I have struck out the petition I find that I am not in a position to make any orders as regards any of the Company property. These are the orders of the court.

October 3, 1996

Aluoch, J