

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 8 of 1994

In The Matter of Container Clear and Transport Services Ltd and In The Matter of Companies Act Chapter 486 Laws of Kenya

JUDGMENT

When this matter came up for hearing before me on 7th March, 1994 Mr Gatheru for the ‘creditor’ (applicant in the main cause) sought an adjournment on the grounds that he was served on 3rd March, 1994 only. I told him I would grant the adjournment provided his client undertook not to advertise the winding up petition. Mr Gacheru was reluctant to give such an undertaking and it transpired that the notice had appeared that very morning in “Daily Nation”.

Mr Ngatia pointed out that it was unfair on the part of the applicant to advertise the petition after his counsel was served with his application dated 3rd March, 1994.

Mr Gatheru informed me from the bar that the winding up petition was actually served on the company on 24th February, 1994 but he had no return of service. When I asked for proof of such service he indicated that the company had first declined to accept service and that the company through its offices suggested service on the company’s advocates. He informed me further that there was another suit between parties hereto. I was not too happy about the manner adopted by the ‘creditor’ in attempting to seek the winding up of the company.

Winding up of company is a drastic remedy. An advertisement to this effect could have a devastating effect on the company. It is for this precise reason that the court of Appeal in the case of Cruisair Limited vs C.M.C. Aviation Ltd (NO.2) (1978) K.L.R. 131 held that it is most undesirable for a petition to wind up a company to be advertised before it is served on the company and there should be a reasonable time between the service and the publication of the petition to enable the company, if necessary, to exercise any rights it may have to restrain further proceedings on the petition.

Now in this particular petition the date of service is not clearly shown. Filing of an affidavit or return of service (if indeed served on 24th February, 1994) could have been the easiest of matters. It was not done.

The winding up petition is based on the affidavit sworn by one Edwin K Mbugua who is shareholder in the company. The other shareholder is his brother David Kageche Mbugua.

Looking at the ‘indebtedness’ of the company deposed to by Edwin K Mbugua, it is clear that none of the payments in question create any indebtedness on part of the company. It is obvious that the petition is being used to coerce the company into paying up what could be payable (if at all) either by D.K. Mbugua or other companies referred to in paragraph 5 of Edwin K Mbugua’s affidavit. This is also clearly borne out in the notice itself, that is, notice prior to filing of Winding up proceedings.

On this ground alone the petition should fail. But I will not do so merely on this ground. The petition is based on a notice dated 20th January, 1994 addressed to D.K. Mbugua. This notice is signed by Mr Gatheru Gathemia.

Section 220 of the Companies Act (Cap 486) provides that the notice prior to winding up of a company must be under the hand of the creditor.

Section 38 provides that a document or proceeding requiring authentication by a company may be signed by a director secretary or other authorized officer of company.

It is clear that where a statute requires personal signature an agent cannot sign. This is one of the exceptions to the general rule what that a person can do what he can do by an agent.

The petition itself is therefore bad. It is dismissed with costs.

Shah, J

March 22, 1994