



**REPUBLIC OF KENYA**

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

**Winding Up Cause 30 of 1989**

**M Weiss Ltd v The Companies Act(Cap 486)**

**Ruling.**

This is an application by way of Chamber Summons under the provisions of Section 3A of the Civil Procedure Act, inherent jurisdiction of the court, the Winding Up rules and all enabling provisions of law for orders that the petition be struck out on the grounds that it is in breach of 10 of the Winding Up rules and S. 270 of the Companies Act. The same is however opposed.

The facts leading to this application are not seriously in dispute. The parties hereto have had business dealings. As a result of the dealings on 6<sup>th</sup> February, 1988, the petitioner, Afri Limited, sent a letter of demand to the Company, M Weiss Ltd. Demanding payment of Shs 134,104/90 for goods and /o services rendered. On receipt of same, the company through its advocates denied liability and asked for particulars as to how the debt was incurred. The petitioner provided same in the form of an invoice and delivery note of the calendars designed and manufactured by them for the Petitioner. They however did not provide the order made for the said services and/or goods, though requested for same. On not being paid, the company filed the current petition in July, 1989, signed by its Managing Director and counter signed by this court's Deputy Registrar. The company opposes the petition and liability on the grounds that it never requested for such services.

At the hearing, Mr Ngunjiri advanced a number of arguments against the continuation of the petition. Firstly he argued that the petition served had not been sealed or signed by the court and as such was a nullity. In support of this contention he referred the court to the case of R. vs H. Sharma (11949) 2 All ER 207 in which at page 210, Lord Goddard stated at letters A to D that lack of such matters if required by a statute as a condition precedent renders the document a nullity. He also stated that the petition should be struck out as it had been advertised before a lapse of seven days for service.

The grounds on which M Ngunjiri impugned the petition is that the company had not been given 3 weeks notice within which to pay or secure the amount demanded such as where a judgment has been obtained. He argued that in the current case the company having been only given 7 days notice, the petition was incompetent and should be struck out.

The third argument which Mr Ngunjii advances is that, the debt, being disputed on bona fide grounds cannot be used to support a petition and that it must be proved that the company was totally unable to pay its debts. He stated that petitions for winding cannot be used to enforce payment of debts. In support of this contention, he referred the court to the cases of Charles Forta Investments vs Amanda (1963) 2 All ER 940,

Re: A Company (1894) 2 Ch. 349 and WC 57 of 1987 in which it was stated that petition is not a proper remedy for failure to pay a debt and the petitions struck out and or stayed as an abuse of the process of court.

Mr Kantai in reply submitted that the petition was duly sealed and signed, that over three weeks had lapsed before the petition was filed, company can be wound up if unable to pay debts as 21 days notice not required. It requires a lapse of 21 days. He stated that in the case of Re: A company, the petitioner was not a bonafide petitioner, while in Charles Forta the debt was not clear or quantified and company solvent. He also referred the court to the cases of Great Britain Mutual Life Assurance Society (1880) 16 Ch. 246, The Imperial Hydropeltic Hotel Co., Blackpool Ltd. (1882) 49 LT 147 Re:- Welsh Brick

Industries Ltd. (1946) 2 All ER 197 in which it was stated that any debt could sustain a petition unless disputed on bonafide grounds.

Starting with the first objection to the petition herein, namely that the petition was not sealed or signed by a court official, it is observed from the record copy of the petition on the file is duly sealed and signed by the registrar of this court. The company did not also exhibit the copy said to have been served yet not sealed. Indeed the one attached is sealed and signed. I therefore find no merit in this objection.

The second one is that a statutory notice was not given of 21 days. I think this is a misunderstanding of the relevant section. According to my reading all that is required is a demand which has not been satisfied for 21 days. This is not same as in the case of an act of bankruptcy which require a statutory notice. I also find no merit in this objection.

The third ground on which the petition is challenged is that the debt is not bonafide, as to entitle the plaintiff to petition for a winding up. This is a valid point, it being settled law that it is an abuse of this court's process to use the machinery of winding up for recovery of a debt. Proceeding on the above basis, it is observed that in this case, the debt is denied on the basis no request for the services was ever made by the company. The company asked for details of the manner in which the order was made but the petitioner instead of providing same, proceeded to file a winding up petitioner. In my view this is a misuse of the winding up procedure as the debt was validly challenged by the company.

In view of the above, I find that this petition is a misuse of this courts process and hereby strike it out with costs.

Orders accordingly.

**July 20, 1992**

**Mbito, J**