



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
BANKRUPTCY & WINDING-UP CAUSE 17 OF 1988
IN THE MATTER OF TRICOR ENTERPRISES LTD
AND
IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA
RULING

The applicant, who is the petitioner herein, one Ann Nyawacha Mwok-Handa, moved the court by Notice of Motion grounded on Rules 6, 7, 22, 28 and 202 of the Company's (Winding Up) Rules, praying that:-

- 1) This application be heard by a Judge in Chambers (this prayer was granted by the Registrar)
- 2) A declaration that the service upon the respondent of a petition which was not sealed and signed by the Deputy Registrar is a formal defect or irregularity which has not occasioned substantial justice within the meaning of Rule 202 of the Company's (Winding Up) Rules.
- 3) An order that the Registrar certifies under Rule 28 of the Companies (Winding Up) Rules that the provisions of the Companies (Winding Up) Rules have been complied with, and that the petitioner's petition may now be heard.
- 4) Costs of the application be provided.

This application was supported by the affidavit of Mr Kamau Kuria, the advocate for the petitioner.

Mr Kihara Kariuki, advocate for the respondent opposed the application, submitting that Winding Up Rules governing this petition as pertains to the sealing of the petition are mandatory, and cannot be waived in the manner being requested for.

According to Mr Kamau Kuria, the matter of the petition was urgent, as the petitioner was a shareholder who was being deprived of the livelihood, as she was no longer in the business due to the breakdown of marriage between her and her husband.

That it was due to these reasons that the petition was not sealed, and that is what made the Deputy Registrar decline to grant his certificate.

Mr Kuria submitted further that there is no Rule which requires that a petition be signed or sealed before it is heard. The requirement is therefore directory as opposed to being mandatory. He requested the court to take Judicial Notice of the fact that Chamber Summons and Notice of Motion, applications are no longer

required to be signed by the Deputy Registrar. That sealing of petitions is analogous to signing of motions by Deputy Registrar. That since it is no longer a requirement that Chamber Summons and Motions be signed the same should apply to a petition.

In any event, Mr Kuria continues, no injustice had been caused to the respondent by being served with a copy of a petition which is not sealed, as the respondent will have a chance to raise objections, if any, at the hearing.

Mr Kariuki, for the company in reply, referred court to the Winding Up Rules, especially Rule 22 sub-Rule 1 and 2 which stipulates that a petition “shall be presented at the Office of the Registrar.....” That the whole purpose of this, according to the Rules is to cause them to be seal so that such sealed copies are used for applying for the Registrar’s Certificate of Compliance.

He submitted further that these rules were pertaining to the procedures in processing the petition before its presentation to the Registrar I find that the requirements are mandatory as was submitted by Mr Kariuki. Nevertheless, it is my discretion that Mr Kuria asked me to exercise, as according to him, failure to have the documents sealed is merely a “formal defect”. I disagree with Mr Kuria on this submission as I do not consider that failure to comply with the Rules is merely a “formal’ defect. The word “formal” is not defined either in the Companies (Winding Up) Rules, or in the Civil Procedure Code, so I am giving it its ordinary everyday meaning, i.e. something that is “concerned with the form, not the matter”. That being so, I cannot see how the requirement of sealing for the purposes of issue of the Registrar’s Certificate of Compliance can be referred to as “formal”. I find it an essential part of the Rules, and indeed, an essential requirement.

As Mr Kuria rightly pointed out, the act of sealing would show that the documents have come from court. Indeed the definition of the word sealed is given as, “sealed” means, “sealed with the seal of the court”.

On the submission that the requirement of sealing be considered as the one time requirement of the Registrar’s signature on Motions and therefore done away with, I would say that it should be borne in mind that the Registrar’s signature in those circumstances, “was not just done away with” as Mr Kuria puts it. There is a Practice Note to that effect and I believe there must have been reasons that warranted it.

I have considered Mr Kamau Kuria’s reasons for not complying with the provision pertaining to the requirement for sealing, but I do not find it all together satisfactory. I do appreciate his submission that the company was a business between husband and wife who were now having a problem, as a result of which his client the petitioner has been deprived of her livelihood. That being so I would have expected Mr Kamau Kuria in filing an application in court to have the relevant documents processed as quickly as possible to facilitate the hearing of the petition. The advocate had caused the petition to be advertised, fair enough, but there was nothing to show that he had presented it for the purposes of having it sealed. All he submitted was that it takes “too long”, but did not explain what he was basing that submission on.

For the above reasons, I decline to exercise my discretion in favour of the petitioner and ignore her “non fulfillment of the requirement of sealing of the petition, to enable her to present it to the Registrar for Certificate of Compliance”.

I proceed to dismiss the petitioner’s application with costs, and rule that the laid down procedure and rules should be complied with, to facilitate hearing of the petition.

Dated and delivered at Nairobi this 9TH day of February , 1989.

J.A ALUOCH

JUDGE