

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

(NAIROBI LAW COURTS)
WINDING UP CAUSE 43 OF 1988

IN THE MATTER OF MAGNUM INTERNATIONAL LTD

AND

IN THE MATTER OF THE COMPANIES ACT (CAP. 486)

RULING.

Mr Khaminwa has applied under Section 228 of the Companies Act (hereinafter called the Act) that notwithstanding that Magnum International Limited (hereinafter called the Company) had been ordered to be wound up by an order of the Court made on 26th June, 1989, the Company may be at liberty to commence proceedings or actions as set out in the body of the application.

Mr A A Esmail acting for the Petitioning Creditor has raised a preliminary objection that Mr Khaminwa could not have acted on behalf of the Company which is already in the control of the provisional liquidator (hereinafter called the liquidator) without being appointed by the liquidator who in this case is the Official Receiver. He has further argued that as soon as the winding up order is served upon the liquidator, he steps into the shoes of the Company and as such the only person who could bring any proceedings or actions on behalf of the Company is the liquidator and that too with the sanction of the Court under Section 241 (1) (a) of the Act. Mr Kihara who appeared for the Official Receiver has stated that this was not an application by the Official Receiver for leave to sue and that the Official Receiver had not appointed M/s Khaminwa & Khaminwa to act for the Company. Subject to that comment he has left the matter to the Court. Mr Khaminwa for the Applicant has submitted that his application is proper and within the four corners of Section 228 and that he was seeking leave of the Court under the said Section 228 and not Section 241 of the Act.

Section 228 of the Act is as follows:-

“When a winding up order has been made or an interim liquidator has been appointed under Section 235, no action or proceeding shall be proceeded with or commenced against the Company except by leave of the Court and subject to such terms as the Court may impose”.

One of the incidents of a winding up order by the Court is that no action or other proceedings either on behalf of the Company or against the Company can be taken without leave of the Court. Section 228 which I have already set out relates to stay of proceedings against the Company on its plain reading. Besides, in paragraph 1365 on page 773 of Volume 7 of Halsbury's Laws of England 4th Edition the learned authors while discussing proceedings against the Company after winding up order have thus stated “no action or proceeding may be commenced or proceeded with against either the Company or any contributory in respect of any of its debts except by leave of the Court”. In the same paragraph a reference is made to Section 231 of the English Companies Act which is in the same terms as our Section 228. I therefore hold that Section 228 is not applicable to the present application.

The relative provisions of the Act relating to the power to bring or defend any action or proceeding of behalf of a company against which a winding up order has been made are contained in Section 241 (1) (a) under which the only person who could bring such action or proceedings in the name of the Company is the Official Receiver in his capacity as the Provisional Liquidator and no one else. He too can do it only with the sanction of the Court or the Committee of Inspection which in this case has not been appointed as yet. After a winding up order has been made the Company can only act through the liquidator who is the governing body of the Company. See *Hilman vs Crystal Bowl Amusement Limited* 1973 1 All ER 379. More so because he is the receiver and manager of its assets,

I therefore uphold Mr Esmail' preliminary objection and dismiss the application before me with costs as it does not lie.

Another point which arises here is if M/s Khaminwa & Khaminwa advocates could have otherwise validly brought this application on behalf of the Company. I think that, unless they had been appointed by the Official Receiver exercising his powers under Section 241 (1) (c) they could not have acted for the Company. Mr Kihara has confirmed that the Official Receiver had not appointed Mr Khaminwa's firm to act for the Company. They were obviously instructed by Justus Kavindo Kalinga who is hereby ordered to bear the costs of the Petitioning Creditor and the Official Receiver.

Dated and Delivered at Nairobi this 21st day of October ,1989.

G.S PALL

JUDGE.