



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**BANKRUPTCY & WINDING-UP CAUSE 11 OF 1979**  
**IN THE MATTER OF KENYA COD STORAGE (1964) LTD**  
**AND**  
**IN THE MATTER OF COMPANIES ACT**  
**RULING**

In this Chamber summons under rule 5(2) of the Companies (Winding-up) Rules the applicant (the company) seeks to have the petition struck out or dismissed on the ground inter alia that the petition is an abuse of the process of the Court. In the hope of saving time I allowed this ground to be argued separately. The other grounds were not abandoned.

Mr Lakha appearing with Mr Esmail for the applicant pointed out three breaches of the rules.

1. The petition had not been advertised “for at least seven days before the hearing” contrary to rule 25 which provides that if not so advertised the hearing shall be cancelled and the file closed unless a judge or the Registrar shall otherwise direct.
2. There has been no service on the company as provided for in rule 24.
3. There has been no attendance before the Registrar to satisfy him that the Petition has been duly advertised and the rules otherwise complied with.

Mr Lakha contended that this last provision was mandatory and that although the usual penalty for non-compliance was the striking out of the Petition on the authority of Royal Mutual Benefit Building Society 1960 3All E.R. 460 the court could make an order dismissing it with costs.

There is I think no merit in these submissions. The Petition was advertised and when the date of hearing was postpone it was agreed that there would be no further publication until after the hearing of the present application. The company whether or not it was properly served was fully aware of the Petition. Although when the present application was filed on 20<sup>th</sup> August 1979, there had been no attendance before the Registrar. There seems to be no reason why the Petition should not attend before the Registrar at any time before the hearing of the Petition.

Lakha further contended that by virtue of the provisions of Section 220 of The Companies Act (Act 486) before a company could be deemed to be unable to pay its debts a demand had to be left at the registered office and had to be under the hand of the creditor. A demand had been served on the Company but out let at its registered office and had been served on the company but not left at its registered office and had

been signed by Gautama as agent of the creditor. Mr Gautama said that a copy of the demand had been delivered by hand at the registered office of the company in Nairobi but I am satisfied that although that may well have been the intention this copy was in fact delivered by and at the company's Mombasa office.

The letter of demand as written by Mr Gautama "duly instructed by Messrs New Mermaid Hotel Limited of Mombasa and with its express authority." He submitted that every creditor was entitled to be represented by a solicitor, that the provisions of Section 220 are rules of procedure which do not over-rule substantial law.

Section 220 so far as applicable reads as follows:

"A Company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding on thousand one thousand shillings then due had served on the company, by leaving it at the registered office of the company, demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction 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 office of the Company. Mr Gautama is not an officer of the Company.

As I understand the provisions of Section 220 they set out conditions which must be strictly complied with before a company can be deemed to be unable to pay its debts. They are not procedural provisions, they are statutory provision and as Mr Lakah submitted they oust the general law of agency. Halsbury (4<sup>th</sup> Edition) Vol, 703 contains a statement that there are 2 exceptions to the general rule that a person may do by means of an agent. Whether he has power to do himself. The first of these is where the transaction is required by statute to be evidenced by the signature of the principal himself.

Mr Gautama referred me to a decision of Hancox J and Sachdeva J in C.A. 70 of 1976 and C.A. 51 of 1977 (consolidated). Auto Engineers Ltd v N Conella & Co Ltd. The learned Judge held that a landlord's notice to quit under the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) could be given by the landlord's advocates. The material words of that Act are "a landlord ..... Shall give notice ..... in the prescribed form." The Act does not provide that the notice shall be under his hand.

Since the requisite conditions for deeming the company to be unable to pay its debts have not been shown to exist the petition is dismissed with costs including the costs of this application.

**Dated and delivered at Nairobi this 14th day of December 1979**

**A.H SIMPSON**

**JUDGE**