



IN THE COURT OF APPEAL OF KENYA

AT MOMBASA

CIVIL APPEAL 209 OF 2007

BETWEEN

UNIVERSAL HARDWARE LIMITED.....APPELLANT

AND

AFRICAN SAFARI CLUB LIMITED.....RESPONDENT

(Appeal from the ruling and order of the high Court of Kenya at Mombasa (Maraga, J.) dated 17th November, 2006

in

Winding Up Cause No.1 Of 2005)

JUDGMENT OF MAKHANDIA, J.A.

On 9th March, 2005, the appellant mounted in the superior court a petition to wind up the respondent pursuant to the provisions of **section 220** of the Companies Act. The main and sole ground upon which the petition was anchored was that as at 30th December, 2004, the respondent was indebted to the appellant in the sum of **Kshs.24,181,684/55** being the amount for goods and or services rendered by the appellant to the respondent. The appellant had made several requests and or demands for payment of the debt but the respondent had failed and or neglected to do so. On 2nd February, 2005, the appellant had caused to be served on the respondent a demand in writing requiring the respondent to pay the amount to no avail. In the premises the respondent could only be deemed to be insolvent and or unable to pay its debts. In the circumstances, it was just and equitable that the respondent be wound up.

The respondent was duly served with the petition whereupon it on 17th March, 2005 filed a chamber summons application dated the even date in which it sought to bar by the appellant by way of an interlocutory injunction from advertising, publishing and or conveying through newspapers or any other publication the petition. It also sought to strike out the petition and of-course costs. The application was grounded on the fact that the petition was an abuse of the process of court as it had been lodged to bring pressure to bear on the respondent to pay a disputed debt, that the court should not be used as a debt collection enterprise especially when the debt was hotly contested or disputed, that the advertisement of the petition could be ruinous to the respondent, that the company was not insolvent, that the appellant had not obtained a court decree against the respondent, the petition had been filed to blackmail and or extort money from the respondent and finally, that the respondent stood to suffer irreparable harm if the intended advertisement was made.

The affidavit in support of the application reiterated and expounded on the foregoing grounds. Suffice to add that the respondent for the first time averred that the appellant failed to serve on it the statutory demand and the petition at its registered offices, instead they were left at **Plot No.1067/1/M.N.** It was for this reason that the respondent had prayed for the striking out the petition on account of being defective. **Mr Rehan Bachmann**, the director of the respondent further deponed that despite the respondent suffering massive fire damage on 1st September, 2003 as a result of which four of its large hotels had been burnt down, it had been able to rebuilt all of them from its own resources. That it was during this period whilst the hotels were unoccupied and being renovated that the respondent bought material including paint from the appellant. It turned out, however, that the paint supplied was materially defective and the colour mostly faded. As a result the existing paint work had to be scrapped off, repainted resulting in additional labour costs as well as loss of revenue to the respondent.

The application came before **Khaminwa, J. ex-parte** on 18th March, 2005 and she allowed prayer 2 thereof. She granted an interlocutory injunction and directed that the application be heard inter-partes on 7th April, 2005, a period of 20 days after as opposed to 14 days permitted or sanctioned by **order 39 rule 3(2)** of the Civil Procedure Rules.

On being served with the order, the appellant did not take it lying down. By a Motion on Notice application dated and filed in court on the same day viz, 23rd March, 2005 the appellant sought in the main an order to set aside and discharge the order by **Khaminwa, J.** aforesaid, and a further order dismissing the application. The main ground in support of the application was that the said order was wholly irregular and the appellant was entitled to have it set aside **ex debito justitiae** on the ground that it was made without jurisdiction being for a duration of more than 14 days in clear contravention of **order 39 rule 3(2)** of the Civil Procedure Rules. In the alternative, the appellant sought that in the event that the order of injunction was not lifted, the application be dismissed on the grounds that the purported dispute alleged by the respondent was first brought to the fore on 8th March, 2005, just a day before the petition could be lodged and more than 21 days after the statutory demand was served upon it, clearly an afterthought. That the whole debt not being disputed the appellant was entitled to a winding-up order over part of the debt which was admitted; that the respondent was deemed to be insolvent and unable to pay its debts when there was no answer from it within 21 days from the date of service of the statutory demand under **section 220** of the Companies Act; and finally, that the appellant was not required to obtain judgment prior to commencing winding up proceedings under **section 220** of the Companies Act.

The affidavit in support of the application was sworn by **Mehul Rawal**, a director and share-holder of the appellant. He essentially expounded on the grounds aforesaid. Suffice to add that the corporate details of the respondent could not be traced as its file was missing at the companies registry and despite several attempts being made by its counsel, the same could not be found, that the service of the statutory demand and petition were effected on the respondent's head offices situate on **Plot No.1066/67/1/MN Shanzu.** In any event it was the appellant's deposition that failure to serve either the statutory demand or the petition on the registered office of the respondent was not fatal to the proceedings, more so, where there was no injustice or prejudice caused by such failure on the respondent. Finally, he deponed that the respondent had not previously disputed the debt. There was no single written complaint on any of the matters even in the face of several written demands from the appellant pressing for payment. Instructively, the appellant had obtained the respondent's computer records amongst other documents from which it heard that the respondent had in fact reclaimed VAT as input tax from Kenya Revenue Authority in respect of the very invoices and the other documents aforesaid that it was disputing and or disclaiming. The documents clearly showed that the sum of Kshs.24,098,476/55 was clearly due and owing from the respondent to the appellant.

By a replying affidavit sworn by **Mr Rehan Beachmann**, the respondent contested each of the appellant's depositions aforesaid. In the main he argued that the grant of injunction was in accordance with the law, that it had not been demonstrated that the company file relating to it was missing at the company's registry, that failure to serve the statutory demand and the petition on a company's registered office was fatal, that a mere omission of the respondent to comply with a notice requiring payment of a disputed debt was not a failure to pay, nor was it evidence of inability to pay. There was a **bona fide** dispute that had to

be resolved before any debt could be paid. That there was a possibility that the appellant had not delivered goods amounting to **Kshs.2,431,543/18**. Otherwise the main issue between them was compensation for overcharging and delivery of inferior quality products. The very fact that the appellant had used dubious and probably illegal means to obtain their internal accounting records said a lot about the appellant's character. As a parting shot, the respondent deponed that indeed there had been several meetings between the parties on the dispute in which the respondent demanded discounts for the inferior items and overpriced goods and instead of resolving the same, the appellant rushed to court to file a petition. Given that there was in fact a **bona fide** disputed debt which had to be resolved before payments were effected, the application should be struck out and its application dated 17th March, 2005 be heard and determined on merit.

On 22nd April, 2005, the High Court granted both parties to file further affidavits. In those affidavits, the parties merely re-canvassed what they had already deponed in their previous affidavits. The only new issue deponed to by the appellant was that **Mr Mehn Rawal** had personally visited the companies registry and was informed that the respondent's file had been irretrievably lost and could not be found.

As for the respondent the new issues raised in **Mr Rehan to Bachmann's** further affidavit was that as a result of the poor quality paint that the appellant had supplied, the respondent had a counterclaim of **Kshs.26,687,598/40** against the appellant. He also made serious allegations of collusion between the appellant and the respondent's junior staff to defraud it by accepting inferior quality items and charging for superior heavy duty quality items.

On 22nd July, 2005, **Maraga, J.** ruled that two applications aforesaid be heard together. Between this date and 21st September, 2006, the learned Judge heard the applications and then reserved the ruling for 17th November, 2006. In a ruling delivered as scheduled, the learned Judge found the petition incompetent and an abuse of the process of court. Accordingly, he struck it out with costs to the respondent. In the same breath he also dismissed the appellant's application again with costs to the respondent.

These are the orders that triggered this appeal on thirteen grounds to wit;

- 1. The learned Judge erred in law in striking out the petitioner's petition dated 8th March 2005 and in dismissing the petitioner's application dated 23rd March 2005 together with costs of the petition and the said application.**
- 2. The learned Judge erred in law in granting the orders sought by the respondent (hereinafter referred to as "the company")_ in its application dated 17th March 2005.**
- 3. The learned Judge erred in law in failing to hold or appreciate that the company had no locus standi to appear in any of the proceedings before him on the ground that the company had not only failed to file its affidavit in opposition to the petition within seven days after filing of the verifying affidavit by the petitioner in accordance with the provisions of Rule 31(1) of the companies (winding-up Rules) but also had further failed to apply for any enlargement of time to file its said affidavit in opposition in order to regularize its presence before the court.**
- 4. The learned Judge further erred in holding that although Rule 25 of the Companies (Winding-Up Rules) did not prescribe for the service of a verifying affidavit upon a respondent company, the same was mandatorily required to be served since a verifying affidavit "occupies the same position as the summons to enter appearance" and that in the absence of such service the petitioner was precluded from raising (or succeeding in) such an objection.**
- 5. The learned Judge erred in law in failing to either consider or determine (properly or at all) the petitioner's application to dismiss the company's application dated 17th March 2005 (and thereby implicitly extending up to the date of his ruling) a wholly irregular ex-parte injunction order which had been granted to the company on 18th March 2005 by Lady justice Joyce Khaminwa for a period exceeding 14 days contrary to the mandatory requirements prescribed under Order XXXIX rule 3(2) of**

the Civil Procedure Rules.

6. The learned Judge failed to take into account material facts and/or alternatively misdirected himself in law in holding that the statutory demand served by the petitioner was invalid ...

7. The learned Judge misdirected himself in law and further failed to take into account the fact that service of the said statutory demand had been actually effected on the principal place of business of the company and that this fact had not been denied by the company.

a) there was no evidence of any injustice or prejudice to the company by any ostensible failure on the part of the petitioner to serve the said statutory demand at the company's registered office.

b) notwithstanding the contents of paragraph 6(a) above, an attempt had been made to serve any one of the directors of the company but that they had refused to accept service.

c) the company had admitted that it had received the said statutory demand.

8. The learned Judge failed to appreciate that in law a company is deemed to be unable to pay its debts once it had failed to respond to the statutory demand within 21 days of its service.

9. The learned Judge failed to appreciate the fact that the company ought to have applied to set aside the statutory demand if there was indeed a disputed debt

10. The learned Judge failed to consider properly or at all (or appreciate the effect of) the facts contained in the documentary evidence adduced by the petitioner in respect of the debt owed to the petitioner (which included the company's own VAT returns and other internal documents such as local purchase orders and delivery notes) as well as all the documents sought to be relied upon by the company as evidencing a dispute ...

11. The learned Judge erred in law in striking out the petition.

12. The learned Judge further erred in law when striking out the petition by failing to appreciate that he was not hearing the petition and that the issue of whether or not the company was solvent was not relevant to the matters before him and, in any event, could only be determined at the hearing of the petition.

13. The learned Judge misdirected himself in law by failing to appreciate or take into account the following matters concerning the company's ex-parte application dated 17th March, 2005.

a) that the said application was made in bad faith, was misleading and did not disclose material facts and ought to have been dismissed on that ground; and

b) that the said application and the orders made under it ought, in any event, to have been declared a nullity on the very same ground as contained in his earlier ruling dated 1st April 2005 when he declined to entertain the petitioner's own ex-parte application dated 23rd March 2005 on the ground "that Rule 7 of the Companies (Winding-Up) Rules requires that all applications in winding-up causes be served on the rival party before they are heard."

The appeal was initially exhaustively argued before **Omolo, Onyango Otieno** and **Nyamu, J.J.A.** However, before the judgment could be delivered **Omolo** and **Nyamu, J.J.A.** ceased to perform judicial functions. That being the case 10th May, 2012, **Githinji, J.A.** made an order thus "**As Omolo J.A. and Nyamu, J.A. no longer perform judicial functions, and as the judgment had not been drafted, hearing de novo before a different bench in the next session, that is, July, 2012.**" These are the circumstances in which we found ourselves re-hearing to this appeal.

When the appeal came up before us for hearing on 25th April, 2013 we directed that since parties had already filed their respective written submissions, the appeal would be canvassed by way of such written submissions and that parties be granted limited time to highlight orally their respective written submissions.

Mr Inamdar, learned counsel for the appellant submitted that service was effected on the respondent of the statutory demand as well as the petition at its principal trading office. That the respondent had not disputed that fact nor had it demonstrated the prejudice it suffered by that service. Counsel submitted that the requirement under **section 220** of the Companies Act that service be at the company's registered office could be waived. The court had discretion to countenance such service so long as there was no injustice or prejudice occasioned to the respondent.

With regard to whether the debt was disputed, counsel submitted that the rule of the thumb was that the debt must be disputed *bona fides* and on substantial grounds. This was not the case here. The alleged dispute was only sprung on the appellant after the petition was filed. Counsel went on to submit that there was evidence from the respondent's records showing that it had claimed VAT from the very invoices that it was disputing. It mattered not how that evidence was obtained. In a civil case the trial court had no discretion in considering such evidence even if it was wrongly obtained.

On the question of the form of the petition, counsel conceded that it was not drawn as per the format under the Companies Act. However, he was quick to point out that those were simple defects amenable to amendments and could even be waived. The respondent had in any event not shown the prejudice it had suffered due to those defects in the form. Concluding, counsel submitted that whether or not the respondent was solvent was irrelevant or a non-issue. Once there was a creditor, such creditor is entitled to petition to wind up a company. In support of his submission counsel referred us to several authorities in his list of 32 authorities filed on 27th July, 2010.

In response, **Mr Swaleh**, learned counsel for the respondent submitted that apart from petitioning to wind up the respondent, the appellant had an alternative remedy available, a civil suit. That no amount of legal authorities or oratory skills could change the facts of the case. To counsel, the ruling by the Judge was well reasoned and addressed all the issues brought before him for determination. The petition had not been filed in good faith. The appellant was out to undertake corporate execution of the respondent in view of the fact that everything was in dispute in the cause. On the issue of VAT, counsel submitted that there was no evidence that the same had been paid to the respondent. In support of all these submissions counsel similarly referred us to various authorities in his list of 36 authorities filed earlier in court.

I have anxiously considered the record of appeal, the grounds raised and canvassed, the respective written and oral submissions before us and the law. The learned Judge struck out the petition and dismissed the appellant's application on the grounds:-

- ***That the statutory demand was not properly served,***
- ***That the petition did not conform with rule 21 of the Companies Winding-up Rules as it failed to set out the details of the company's registered offices, its share capital and objects and*** lastly,
- ***That the petition was an abuse of the process of court as it was based on a disputed debt.***

All these have been captured in various grounds of appeal filed by the appellants. I do not therefore propose to deal singularly with each ground. Rather I propose to address them globally.

In dealing with the first issue, the starting point must of necessity be sections 219(e) and 220(a) of the Companies Act. These are the sections which deal with winding of a company on account of its failure to pay its debts. In particular **section 220(a)** is pertinent and it provides *inter-alia*:-

"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 one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a 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;”

(b).....

(c)”

No doubt a careful reading of the section does not make it mandatory that the statutory demand must be left served at the registered offices of the company. There is no use of the word “shall.” To my mind therefore the requirement is not mandatory but merely directory. This proposition receives support in **rule 24(1)** of the Companies (Winding-Up) Rules which specifically envisages service on an office that is not necessarily the registered offices of the company. It provides:-

“... Every petition shall, unless presented by the company, be served at its registered office or, if there is no registered office, at the principal or last known principal place of business thereof.”(emphasis provided).

As the requirement appears to be directory, it can be safely ignored. A requirement is never intended to be optional if a word such as “shall” or “must” is used. See ***R v Immigration Appeal Tribunal ex-parte Jyeestation*** (1999) 3 ALL ER 231. The court also held that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable caution. As stated in the case of ***Bray Head (Ascot) Ltd v Berkshire County Council (1964) 2QB 303***, in the majority of cases whether the requirement is categorized as directory or mandatory, the tribunal before whom the defect is properly raised has the task of determining what are to be the consequences of failing to comply with the requirement in the context of all the facts and circumstances of the case in which the issue arises. In such a situation, the tribunal’s task will be to do what is just in all the circumstances.

In the circumstances of this case, it is not disputed by the respondent that the statutory demand was not served on it. All that it is saying is that it was not served on it at its registered offices. What is the purpose of service? It is to bring to the attention of the opposite party that a serious action is contemplated against it unless the demands in the notice are met. There is evidence that which was disregarded by the learned Judge of failed attempts to ascertain the details of the respondent from the companies registry. The appellant could not simply find the respondent’s file in the companies registry. Missing of files in the Companies registry is not something new. It is a daily occurrence. Accordingly, I do not believe that the appellant just made up the story of the missing file as the learned Judge seems to have believed. No useful purpose will have been served by the appellant taking such destructive cause knowing that the petition could stand or fall on that aspect of the matter. On the material before the Judge, the only plausible conclusion he should have come to was that the appellant had made diligent efforts to carry out a company search to ascertain the registered offices of the respondent but its file could not be traced at the Companies registry. Of course the learned Judge dismissed the several attempts made to locate the file by the appellant’s advocates on the ground that the internal memorandum from the appellants’ advocates’ offices failed to specify who made the search and was written by somebody other than the person who made the search. As correctly submitted by counsel for the appellant, the memorandum does specify the name of the particular member of the staff who made the search. In any event, this was not even an issue raised by any of the parties and it seems the Judge reached the conclusion ***suo moto***. The Judge too impugned the credibility of ***Mr Rawal*** on his deposition regarding the several attempts made to ascertain particulars of the respondent from the Companies registry on the ground that going by the manner the appellant had obtained internal accounting records of the respondent, he lacked the necessary integrity and credibility. To my mind, this was a gross misdirection on the part of the Judge. First, the respondent did not allege or complain that those records had been obtained illegally and or in an oppressive manner. Even if that was the case, this was a civil matter and not a criminal matter where evidence illegally obtained can be suppressed. Reading through ***“The modern law of evidenc 2nd Edition by***

Adrian Keare and Karuma son of Kamu v Regina (1955) I ALL ER 236, there is a consensus that it matters not whether evidence is illegally or improperly obtained. Such evidence if relevant is admissible and the trial court has no discretion in the matter to exclude it. Accordingly, the rejection of the appellant's evidence on the issue of non-availability of the respondent's file in the Companies registry on that score was plainly fallacious on the part of the Judge.

The respondent having acknowledged that indeed it was served with the statutory demand as well as the petition, and its only beef being that the two documents was not served on it at its registered offices, can such failure be deemed as fatal so as to call into question the entire proceedings? I do not think so. As correctly stated in the case of **Jihendra Brahmatt v Dynamic Engineering** (1982-88) I KAR 1001

“The failure to comply with rule 23 was not fatal to the petition and there was no evidence to suggest that, at this stage the case had reached, the company had suffered any substantial or irremediable prejudice or injustice. Moreover, there existed adequate powers under the rules to extend time appropriately in the discretion of the court ...”

Although the court was addressing the issue of service of petition under that rule, the reasoning can equally be applied in the circumstances of this case. Essentially what the authority is saying is that provided that there was no injustice or prejudice caused by any irregularity, the court has a discretion to waive or even overlook such procedural irregularities. In this case, the respondent did not demonstrate that it had suffered prejudice or injustice as a result of failure to serve the statutory demand and petition on it at its registered offices. **Ibrahim, J.** (as he then was) did consider in **Re Gilani Butchery Ltd, W.C. No.8 of 2003 (UR)**, the issue of injustice and was of the view that where no injustice or prejudice was caused, he would not treat such failure or omission as an irregularity going to jurisdiction. I wholly agree with this proposition. The overriding consideration where there is an allegation that some procedural requirements in litigation have not been met, is whether prejudice or injustice has been caused as a result. This is in consonance with **article 159** of our current constitutional dispensation which is to the effect that justice shall be administered without undue regard to procedural technicalities.

It must also be appreciated that the Companies Act and the rules made there-under came into force almost 51 years ago on 1st January, 1962 to be precise. Since then the law in England from which our Companies Act heavily borrowed from has moved on and whereas we have remained stagnant. With the development of technology and our movement into the 21st century and where even electronic service is contemplated to insist that service of the statutory demand and the petition be at the registered offices of a company is not only ridiculous but also flies in the face of technology. It may have served good purpose in those old days but it is certainly now out of sync with the demands of the modern world.

I have looked at the respondent's authorities in support of his submissions that the statutory notice and petition were incompetent on account of improper service. Those cases are **Kenya Cashewnuts Ltd v National Cereals & Produce Board** (2002) I KLR 652, **Re Standard** (2002) 2 E.A. 617, **Matic General Contractors Ltd v Kenya Power & Lighting Company Ltd** (2001) 2 E.A. 440 and **Cruisair Ltd v CMCC Aviation Ltd (No.2)** (1978) KLR 131. What emerges is that those cases are clearly distinguishable from the instant case. In **Kenya Cashewnuts**, the issue at hand was defects in the content of the statutory demand and failure to effect any service whatsoever. In the **Re-standard**, the issue before the Judge concerned the validity of the petition as it did not bear the seal of the company and secondly, the verifying affidavit failed to disclose whether the deponent was an officer of the company or had the capacity or authority to swear the same. In **Matic General Contractors Ltd** as well as **Cruisair** the Court of Appeal dealt with the question of the use of the winding-up procedure as a means of enforcing payment in circumstances where there was already a civil suit between the parties. Those are not the situations obtaining here.

Finally, on this question, the respondent has argued rather vigorously that the requirement that statutory demand and petition must be served at the registered offices of the company is a mandatory requirement by virtue of the statutory provisions of the Companies Act and failure to do so cannot be cured by reliance on subsidiary legislation by virtue of **rule (202)(1)** of the Companies (Winding-up) Rules. In other words, the respondent is saying that there is ostensible conflict between the provisions of the Act and the rules

made there-under. In that event, if I got the respondent correctly, then the provisions of the Act must prevail over the subsidiary legislation. In support of this proposition, he begs to rely on the case of ***Mwalagaya v Bandari*** (1984) KLR 751. My response is that and as we have already stated, I discern no mandatory requirement that both the statutory demand as well as the petition must of necessity be served on registered offices of the company. The requirement is merely directory as opposed to mandatory. I therefore do not see any inconsistency whatsoever between these provisions. The ***Mwalagaya*** case dealt with the inconsistencies between the provisions of the Registration of Titles Act and the Civil Procedure Act as to the method to challenge a caveat in court. Whereas the registration of Titles provided that such challenge could only be initiated by way of originating summons, the Civil Procedure Act and the rules made there-under provided another mode; that was inconsistent with the Act. The court held that the provisions in Registration of Titles Act prevailed and rightly so in my view. In this case, I am not dealing with conflicting provisions contained in different statutes but with two provisions within the same Act and concerning the same subject, winding up proceedings. This authority is therefore of no assistance to the respondent.

As correctly submitted by counsel for the appellant, it cannot be right, having regard to the facts of this case, that the service of a statutory demand on a company's Principal place of business be considered so perverse as to nullify the entire winding up proceedings. There was sufficient evidence placed before the Court to show that the appellant, despite making strenuous efforts, was unable to locate the respondent's file in the Companies registry, contrary to the holding by the Judge that it had not been shown that any effort was made to serve the notice on any responsible office of the company. The effect of a finding of this nature would be effectively to lock out every petitioner who is unable to find out from the registry the details of a company he wishes to wind up. And supposing the owners of the company had a hand in the disappearance of the file never to be seen, what remedy would be available to the creditor? He will definitely be left at the mercy and idiosyncrasies of the debtor, a bad and hopeless situation indeed. That cannot be the intent of the law.

I now turn to consider the second reason that the learned Judge hinged his decision in striking out the petition. This was that the form of the petition was fatally defective in that it contained no details of share capital, registered address, principal objects of the respondent and details of incorporation. Relying on "***Practice & Procedure of the Companies Court***" by ***Boyle & Marshall 1997***, the Judge held that it was a fatal omission if the petition did not contain those details. He also disbelieved the appellant's plea that the failure to provide those details was as a result of its failure to trace the company's file at the Companies registry so as to decipher the said information. He believed that the appellant, its employees and its firm of advocates merely assumed that the registered offices of the respondent was at ***Plot No.1066/67/1/MN*** and without much ado proceeded there and served the statutory demand as well as the petition; lastly given the way the appellant obtained the computer records of the respondents, put a question mark on its integrity and he was not therefore prepared to take the appellant's word on the issue.

Rule 21 of the Companies (Winding-up) Rules provides that "***Every petition shall be in form No.3, 4 & 5 with such variations as circumstances shall require***" (emphasis provided). Form 4 is the one relevant in this cause. It requires the petitioner to state the full situation of the registered office as well as the postal address of the company to be wound up, its nominal capital, the objects for which the company was incorporated and consideration for the debt, with particulars so as to establish that the debt claimed is due. Given the fact that the appellant could not trace the respondents' file in the Companies registry, should the petition be defeated for want of form? I think not. Surely "***such variations as circumstances shall require must come to the aid of the appellant.***" To insist otherwise will be absurd.

My careful reading of the ***practice and procedure of the companies courts*** (supra) suggest that the learned Judge misapprehended what the learned authors were saying on the question of misstatements and amendments to the petition. With regard to misstatements in the petition, this is what the authors said:-

"If a defect, which is other than trivial, is noticed in the petition, the petitioner should apply to the court for leave to amend the petition. The application may either be made ex parte to the registrar in chambers on a date prior to the hearing of the petition, or may be made in open court on the hearing of the petition. If the required amendment is not one which would require the petition to be re-served

on the company (for example, an amendment to the name of the company stated in the Prayer to the petition), the application for leave to amend can be left to the hearing of the petition; the registrar will then be able to give leave to amend, and on the petitioner's undertaking to effect the amendment forthwith, the registrar may make the winding-up order without further delay. However, if the amendment is of a kind which requires the petition to be re-served on the company (for example, the petition misstates the debt which is due from the company or does not set out the correct address for the company's registered office), the application to amend should be made prior to the hearing of the petition, so that the petition may be amended and re-served in advance of the hearing. If the application for leave to amend such a defect is left to the hearing of the petition, there will necessarily be an adjournment. Once leave to amend has been obtained, the amendment is made in the conventional way."

It can readily be seen that the omissions complained of are curable by amendments. The petition had not reached the stage of hearing so that the Judge, if he was so minded would then have dealt with the issue as appropriate at that stage.

The defects complained of in my view were precisely due to the absence of the respondent's file in the companies registry for perusal and or search by the appellant; they were the kind of defects or omissions that could not be the subject of an amendment either at or prior to the hearing of the petition proper. The record shows that parties were nowhere near the hearing of the petition. Accordingly the Judge should have been slow in taking the drastic step of striking out the petition on that basis. I have already addressed the issue of the credibility of the appellant having regard as to how it obtained accounting records of the respondent, elsewhere in this judgment and I need not therefore revisit the subject.

Turning to the last ground, I must observe just like the learned Judge did that winding-up a company is not easy walk in the park. It is a draconian step that can only be taken or resorted to in the clearest of cases and perhaps as a last resort to recover an obvious debt owing. *Kwach, J.A.* in *Matic General Contractors Limited* (supra) observed that it amounted to corporate execution whereas *Ringera, J.* likened it to passing a death sentence on an individual in *Kenya Cashewnuts Limited* (supra). The respondent takes the position that the petition to wind it up was an abuse of the court process as the alleged debt is disputed, that the respondent is solvent and the petition was filed ostensibly to exert pressure on it so as to pay a debt disputed on substantial grounds. On the other hand, the appellant's take is that the respondent genuinely owed it the sum of **Kshs.24,181,684/55** on account of goods supplied and or services rendered. Payment had been demanded over a period of time albeit unsuccessfully leading to the issuance of the statutory demand. It was only a day to the filing of the petition that the respondent for the very first time disputed the debt. To the appellant, in disputing the debt at that late hour was not an act of good faith but was merely calculated to delay the payment.

The principle as I understand it is that a disputed debt on substantial and *bona fide* grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis. In the case of *Mann v Goldstein* (1968) 2 ALL ER 769, 775 *Ungoed – Thomas J.* delivered himself thus"-

"... the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, unless a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court ... The legitimate purpose of such a process is to wind up a company on a ground specified in the Companies Act 1948 which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because section 224 makes it a prerequisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent."

In the case of *Cruisair Ltd* (supra) *Madan, Wambuzi and Law, J.J.A.* had this to say over the issue:-

***“The winding-up court is not to be used for debt-collecting purposes, nor is it to be used for the purpose of deciding a disputed debt. If a debt which forms the basis of a winding-up petition is disputed on substantial grounds the court has to decide on the evidence before it whether to exercise its discretion to wind up the company.*”**

I am of the opinion that when a debt is disputed the onus of establishing its genuineness lies principally on the company though differently than in an ordinary case which is that he who challenges proves. The court must look at all the circumstances. In the case of a winding-up petition there are two facets to this issue; the court must grasp a feeling of the whole situation including both sides and decide not only that the debt is disputed on substantial grounds but also that the petitioning creditor’s debt is owing, after taking into account the challenge directed to it, without which the petitioning creditor would have no locus standi to present the petition. It is a decision which ought to be based upon the balance of the net weight of the evidence before the court provided the credible balance on the winning side carries the force of probability and is not merely of slight weight, for it is a serious matter to order a trading company to be wound up.”

Finally, I make reference to *Re Global Tours and Travels Ltd* (2001) I E.A. 195 where it was held that:-

“... where an alleged debt is disputed on substantial grounds, or bona fide, a claimant is not a creditor and does not have the locus standi, to present a winding up petition. A substantial dispute is not merely to be inferred from the affirmation of one party that there is a dispute and an affirmation to the contrary by the other party ...”

On the same issue, the following relevant paragraph appears in *Buckley* on Companies Acts (11th Edition at pages 356, 357.)

***“A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court.*”**

The winding-up court is not to be used for debt-collecting purposes, nor is it to be used for the purpose of deciding a disputed debt. If a debt which forms the basis of a winding-up petition is disputed on substantial grounds the court has to decide on the evidence before it whether to exercise its discretion to wind up the company.”

If it transpires that there are mistakes in the petition, whether by misstatement or omission, the petition will have to be amended with the leave of the court, unless the court can be persuaded that the mistake is trivial and that the defect in the petition ought to be waived. Examples of trivial misstatements which the court should be prepared to waive are: minor discrepancies in the statement of the petitioner’s registered office; minor misstatements in the details of the company’s capital; and minor misstatements in the description of the company’s principal objects. More fundamental mistakes which will require amendment include: errors in the name of the company to be wound up, particularly in the prayer; material errors in the description of the registered office of the company to be wound up; and errors in the description of the petition debt and how that debt arose.

If a defect, which is other than trivial, is noticed in the petition, the petitioner should apply to the court for leave to amend the petition. The application may either be made ex parte to the registrar in chambers on a date prior to the hearing of the petition, or may be made in open court on the hearing of the petition. If the required amendment is not one which would require the petition to be re-served on the company (for example, an amendment to the name of the company stated in the prayer to the petition), the application for leave to amend can be left to the hearing of the petition; the registrar will then be able to give leave to amend, and on the petitioner’s undertaking to effect the amendment

forthwith, the registrar may make the winding-up order without further delay. However, if the amendment is of a kind which requires the petition to be re-served on the company (for example, the petition misstates the debt which is due from the company or does not set out the correct address for the company's registered office), the application to amend should be made prior to the hearing. If the application for leave to amend such a defect is left to the hearing of the petition, there will necessarily be an adjournment. Once leave to amend has been obtained, the amendment is made in the conventional way."

The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is ***bona fide***. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a ***bona fide***, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt. In ***Tanganyika Produce Agency Limited (1957) E.A. 241***, commenting on the issue, the court observed that:-

"... If it is shown that the alleged dispute is not bona fide one the objection to the petition fails. Thus it is not uncommon for a company, after again and again begging for time for payment of the debt to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion and meets with no favour from the court ..."

To my mind this is what appears to have happened in the circumstances of this case.

It is not disputed that the respondent was supplied with goods by the appellant over a period of time. Indeed by the time of presentation of the petition the debt had been outstanding for close to two years. It is also common ground that the appellant had all along been demanding settlement of the debt to no avail. Indeed there are several letters demanding payment whose receipt by the respondent is not disputed or denied. It is instructive that all those letters elicited no response at all from the respondent. Infact some of those letters refer to meetings held with the respondent and promises made by the respondent to pay at those meetings. However, it appears the respondent never kept its promises. It is also common ground that until then there had been no complaint from the respondent as to the quality, quantity and or price charged on the items supplied. The first formal complaint if at all came on the eve of the filing of the petition vide a letter by the respondent's advocates dated 8th March, 2005. Then there is the aspect of the respondent relying on the very invoices that it is now seeking to impugn to claim VAT rebate. It is also instructive that the report by SGS questioning the quality of the paint supplied is dated 17th March, 2005. This was eight days after the petition was presented and served on the respondent. It purportedly relates to paint supplied to the respondent by the appellant on unspecified date. There is no indication in the report that the paint concerned was supplied by the appellant. It could well have been supplied to the respondent from any other supplier. The appellant was not the only one supplying hardware materials to the respondent. In any event it would appear to me that as at the time the appellant was demanding payment, followed by several meetings until the service of the statutory demand and petition, the quality of the payment was never an issue. Had that been an issue, it would have featured in those meetings and or correspondence. It does appear to me and as correctly posited by the appellant that as the cause progressed, the respondent went about fishing for evidence. The exercise was clearly intended, post fact the presentation of the petition, to surmount the hurdle posed by the genuineness of the debt. The respondent went on a spree of collecting purported self serving evidence from its building contractors to rectify paints allegedly supplied by the appellant and a report from ***SGS*** verifying that the paint did not meet the specifications. It also instructed that the respondent's affidavit in support of the application that led to the ***ex parte*** orders obtained on 18th March, 2005, makes no reference at all to the previous correspondence and various pleas by the respondent to be given time within which to pay. This aspect of the matter was deliberately held back or concealed from court. All said and done, I think that the Judge simply failed to understand that the basis for any of these disputes did not exist on the date when the statutory demand was served or the petition was presented. The foregoing analysis of the conduct of the respondent clearly shows that it was not ***bona fide*** in disputing the appellant's debt. It is clear that the respondent's sole purpose was to create a fictitious dispute so that it can avoid paying what is owed to the

appellant. Indeed the dispute was not even on substantial grounds.

The upshot of the foregoing is that, there was no *prima facie* evidence at that stage that the debt was disputed on *bona fide* grounds. Yes, there may have been a counterclaim. Much as it was urged late, and the Judge felt that it required interrogation, he ought, at the very least, to have allowed the cause to proceed to the hearing on merit so as to determine on the evidence tendered whether the counterclaim was *bona fide*. In the same breath the court would have determined whether indeed the debt was disputed in a *bona fide* manner.

What I have said is enough to dispose of this appeal. I need not therefore deal with the issue of the *ex-parte* injunction issued by *Khaminwa, J.* which was in excess of the statutory period, issues of material non-disclosure, the *locus standi* of the respondent, solvency or otherwise of the respondent and finally, the issue of effective alternative remedy to winding up proceedings.

In the result, I allow the appeal and set aside the ruling and order of *Maraga, J.* dated 17th November, 2006. In substitution thereof I order that the respondent's application dated 17th March, 2005 be and is hereby dismissed with costs to the appellant. The appellant too shall have the costs of this appeal.

Dated and delivered at Malindi this 19th Day of June 2013.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

**I certify that this is a
true copy of the original.**

DEPUTY REGISTRAR

JUDGMENT OF GITHINJI, J.A.

I have had the advantage of reading the judgment of *Makhandia, J.A.* in draft.

I agree with it entirely and have nothing useful to add.

Accordingly, as *F. Sichale, J.A.* agrees, the appeal is allowed, the ruling and order of *Maraga, J.* dated 17th November, 2006 is set aside. The respondent's application dated 17th March, 2005 is dismissed with costs.

Costs of this appeal to the appellant.

For avoidance of doubt the result is that the winding-up petition shall proceed to hearing on the merits.

Dated and delivered at Malindi this 19th day of June, 2013.

E. M. GITHINJI

.....

JUDGE OF APPEAL

JUDGMENT OF SICHALE, J.A.

I have had the advantage of reading the draft judgment of *Makahndia, J.A.*

I agree with it and have nothing useful to add.

Dated and delivered at Malindi this 19th day of June, 2013.

F. SICHALE

.....

JUDGE OF APPEAL