



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA PEAL AT MOMBASA

BANKRUPTCY AND WINDING UP CAUSE NO. 5 OF 2005

IN THE MATTER OF: AMARCO (KENYA) LTD

AND

IN THE MATTER OF: THE COMPANIES ACT

CHAPTER 486 OF THE LAWS OF

KENYA

RULING

The subject matter of this ruling is the Preliminary Objection dated 9th January 2006 which read as follows:-

“Take Notice that the Company, M/s Amarco (K) Ltd intends to raise a Preliminary Objection that the hearing of the Petition is premature as the same has not been served in accordance with the law and that the Petition is fatally defective in law.”

The substantive matter in this proceeding is a petition dated 30.9.2005 for the winding up of Amarco (K) Ltd presented by the Kenya Ports Authority hereinafter referred to as K.P.A. The petition is verified by the affidavit sworn by Raha Mwambela Jilo on the same date.

Amarco (K) Ltd filed a replying affidavit and a Preliminary Objection to resist the petition. When the petition came up for hearing, it became imperative for the Preliminary Objection to be disposed of first. It was the submission of Mr. Ng’ang’a advocate for Amarco (K) Ltd that the verifying affidavit of Raha Mwambela Jilo is fatally defective because it does not contain the deponent’s true place of abode and that the deponent did not further disclose the sources of information and his grounds of belief. It was argued that since the verifying affidavit is fatally defective then the petition remained unverified hence incompetent.

The second ground of objection raised and argued is that the petition was not served as required under rule 24 of the Winding Up Rules. It is claimed that the petition was served upon one Anastasia Gitau, a

person who was not authorized by Amarco (K) Ltd to receive documents on its behalf. It is the averment of the company that it came to learn of the existence of the Winding Up Cause through the Newspapers.

On his part, Mr. Kassim Shah advocate for K.P.A. vehemently argued against the Preliminary Objection. Mr. Shah urged this court to ignore the objection for being technical to avoid injustice being visited upon the parties. It was in his view that the defects were not fatal because the affidavit complained of was in compliance with Form 11 of the Companies Act.

I have considered the able submissions of both learned Counsels. I have also perused and considered the material placed before me. I will begin by considering the last ground that is to say whether or not the petition was served or not. K.P.A. has filed the affidavit of service of Bernard Mwanzia sworn on the 10th November 2005 to prove that the petition was served. In that affidavit it is stated that Bernard Mwanzia served the Winding Up Cause plus the verifying affidavit upon Amarco's legal Officer called Mwangi. It is the submission of Mr. Ng'ang'a that one Anastasia Gitau was served and that she had no authority to receive such documents on behalf of Amarco (K) Ltd. After a careful consideration of the arguments I am satisfied that Amarco (K) Ltd was served. It does not make sense for the company to leave its official stamp to an unauthorized person to acknowledge receipt of documents from third parties. In any case the company does not deny that a Mr. Mwangi is their legal officer. I think Anastasia Gitau was not candid to this court in her affidavit annexed to the replying affidavit of John Ngata Kariuki. No reasonable person can accept her averments that she acknowledged receipt of some documents from a stranger by stamping on behalf of a company whom she did not work for. Anastasia Gitau should for her good read and understand the provisions of Section 11 of the Oaths and Statutory Declarations Act.

On the first point it is claimed that the verifying affidavit was fatally defective because the deponent did not disclose the sources of information and that the deponent's true place of abode is not disclosed. It is the submission of Mr. Ng'ang'a that the affidavit did not comply with the provisions of order XVIII rules 3(1) and 4 of the Civil Procedure Rules. Mr. Kassim Shah stated while opposing this ground that the provisions of the Civil Procedure Act and the rules do not apply.

The substantive law governing affidavits is the Oaths and Statutory Declarations Act. The Rules are set out under Order XVIII of the Civil Procedure Rules. It should be noted that the Companies Act does not contain rules in respect of affidavits. The Companies Act recognized this inadequacy in rule 203 of the Companies (Winding Up) Rules. Rule 203 provides as follows:-

“In all proceeding in or before the court, or any Judge, Registrar or other officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court.”

What it means therefore is that the Civil Procedure Rules are applicable in respect of affidavits.

It is not denied that the verifying affidavit of Raha Mwambela Jilo is defective. The same did not disclose the sources of information nor his belief. The affidavit did not also indicate the deponent's true place of abode. What is the effect of these apparent defects? The East African court of Appeal restated the position in the case of **Premchand Raichand & Another Ltd =vs= Quarry Services & others [1969] E.A. P. 514** as follows:-

“It has repeatedly been said by this court that affidavits based on information must disclose the source of information This is not merely a matter of form but goes to the essential value of the affidavit. . . . But since the source of the information may have been unreliable, the affidavit can have no evidential value.”

In my view an affidavit which does not comply with the provisions of order XVIII rules 3(1) and 4 is incurably defective. The only remedy, is to have such affidavits struck out which I hereby do.

What happens to the petition? The provisions of rule 25 of the Companies (Winding Up) Rules provides that a petition shall be verified by an affidavit which shall be sworn and filed within 4 days after the petition has been presented.

The view I take is that the petition shall not be rendered defective in the event that the verifying affidavit is struck out. I hold the view that this court can exercise its inherent power to grant the Petitioner leave to file a verifying affidavit within a given time.

The end result is that the preliminary objection is upheld resulting to the following orders:-

- (i) The verifying affidavit of Raha Mwambela Jilo is ordered struck out.
- (ii) The Petitioner is granted leave of 2 days to file and serve another affidavit verifying the petition.
- (iii) Costs of the Preliminary Objection shall abide the outcome of the petition.

Dated and delivered and Mombasa this 24th day of Febraury 2006.

J.K. SERGON

J U D G E

In the presence of

Kinyanjui h/b Ng'ang'a for the applicant and

Mr. Mwakisha for the firm of AB Patel for the petitioner.