



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**WINDING UP CAUSE 42 OF 1986**

**IN THE MATTER OF SHADOWS & LIGHTS LTD**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**RULING.**

At the hearing of this application Mr Esmail for the petitioning creditor took a preliminary objection to the fact of the affidavit of Mr Feldman which is a record as having been filed on 17<sup>th</sup> February, 1987. Mr Esmail's contention arises out of rule 31 of the Companies (Winding Up) Rules which requires that the affidavit in opposition to the petition for winding up must be filed within 7 days. Although the earlier affidavit of Mr Feldman was filed out of time Mr Esmail did not object to it. Mr Esmail's further complaint is that in any event there is no provision in the Rules for filing further affidavits. In essence Mr Esmail asks me to disregard that affidavit and the annexed affidavit of Jaishree Shah. I am asked to treat the affidavits as pleadings. I will revert to that later.

Mr Esmail's objection (apart from time factor) to the so called supplementary affidavit of Mr Feldman (filed on 17-2-87 ) is that it depones to matters of hearsay nature which cannot be allowed as this matter had come up for a full hearing and not as an interlocutory matter.

Mr Esmail says further, that ----- for paragraph 12 of the said affidavit, it does not in any way respond to the affidavit of Mr Abraham Desheti filed on 29.1.1987. that the written agreement, referred to in the said affidavit of Mr Feldman is not shown or annexed that most of the facts deponed to therein could have been deponed to much earlier. That there are irregularities in the former and substance of paragraphs 11 and 8 of the said affidavit, viz, paragraph 11 refers to a defence in another suit which defence is not annexed, that letter marked 'A' (paragraph 8) is not annexed.

Mr Nagpal met Mr Esmail's objection by submitting that the supplementary affidavit is not a replying affidavit. It is intended to be read with the original affidavit of Feldman. However, Mr Nagpal goes on to submit and show that Mr Khan (who is on record as acting for the company ) did not despite several searches find the petitioner's verifying affidavit and hence the delay. I cannot quite understand her arguments. An affidavit in opposition has to be filed within seven days of the date on which the verifying affidavit is filed – not a further or supplementary affidavit.

Mr Nagpal submits that a party can file a supplementary affidavit at any time. With respect I cannot

agree with that proposition. If an affidavit is sought to be filed to supplement. The original affidavit then it must be what it is meant to be; to supplement or add as the facts already deponed to in the first opposing affidavit. Extension of time to file such an affidavit therefore must be sought. None was sought here.

There is no doubt therefore in my mind that the so called supplementary affidavit was filed out of time and without leave.

I have been urged to find that the affidavits in a winding up cause are pleadings. I would not agree with that submission. Affidavits serve the purpose they are meant for, that is, to depone to facts in ----- of or to oppose the petition as the case may be. I have not come across any authority which suggest that winding up petitions can proceed on the basis of affidavits only. On the carnary facts can be tested in cross-examination. See C.A. No 92 of 1983 Brahmhatt vs Dynamics Engineering Limited at page 15 of The judgment (unreported) of Hancox J.A.. By the same reasoning the affidavit of Jayshree Shah can be challenged on cross examination. The petition would, I believe, simply have to call upon Mr Khan on Mr Nagpal to make her available for cross-examination.

It would be futile for me at this stage to embark upon the task of finding act whether or not there are legitimate grounds to oppose the petition. That will be gone into only after a fuel hearing of the petition.

I have already found that the supplementary affidavit was filed out of time. I also find that the affidavit (apparently filed in a hurry – I accept Mr Nagpal's explanation – by Mr Khan ) lacks two documents.

But on these findings I am not ----- to disregard the supplementary affidavit under Rule 201 of the Companies (Winding Up) Rules the court has power to enlarge or abridge time. Rule 201 gives almost unfettered power to court (in a fit case ) to enlarge time.

Exercising my discretion under Rule 201 aforesaid I enlarge the time for filing of the supplementary affidavit so that it may be deemed to be filed already on the date it was filed. I also order that the missing documents be supplied by way of a further affidavit within 15 days to-day. ----- Mr Esmail need time to file further affidavit he may do so within 15 days of service of that corrective affidavit on him.

As a result of the company not complying with Rule 31 aforesaid a day of hearing was wasted. I order that costs thrown away and occasioned by the said non-confidence (namely a day's hearing and attendance to-day) be paid by the company to the petitioner within 28 days of taxation.

This petition will proceed to hearing after the two afore-mentioned affidavit are filed. Hearing date may be taken at the Registry and I direct that an early hearing ---- be given by the Registry. Hearing would take at least 3 days as I see it. The petition may be heard by any Judge or Commissioner.

**May 27, 1987**

**SHAH**

**JUDGE**



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