Case Number:	Winding Up Cause 3 of 1996
Date Delivered:	23 Jan 1997
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Moijo Matayia Ole Keiwua
Citation:	In Re Kenya National Trading Corporation Ltd [1997] eKLR
Advocates:	-
Case Summary:	**[RULING] Company Law-**setting aside-application to set aside and or review the winding up order-on the ground that no evidence was led in support of the petition and the hearing of the petition was not advertised as required by law-where the debt upon which the petition was based was seriously disputed-whether there would be irremediable prejudice or injustice to be suffered by the petitioner if the winding up order was set aside- r.7 (2) of the Companies Winding Up Rules, section 221 (1) (iii) of the Companies Act and 0.44 r.1 of the Civil Procedure Rules
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-

Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 3 of 1996

In The Matter of Kenya National Trading Corporation Ltd and In The Matter of Companies Act

Ruling.

This is an application to set aside and or review the winding up order of November 3, 1997.

At that same time it is prayed that the time for filing the affidavit in opposition to the petition be enlarged. The application is based on the fact that no evidence was led in support of the petition as required by law, the hearing of the petition was not advertised as required by law. Additionally the petitioner failed to provide security for costs before the hearing of the petition as mandatorily required by law. It is contended that the alleged debt which is the subject matter of the petition is seriously contested.

The petition was filed on January 23, 1996 and fixed for hearing on April 25, 1996 but was stood over generally on that date. The petitioner attended the Registry on August 21, 1997 and fixed the petition for hearing on November 3, 1997 ex parte. The petitioner was not advertised for hearing on that date. The affidavit in opposition to the petition was filed on April 17, 1996 which was on the date of the petition hearing and was objected to as having been filed out of time.

On the hearing date no evidence in support of the petition was led but reliance was exclusively made to the verifying affidavit. The petitioner did not give any security for costs before the winding up order was issued.

It is stated that the counsel acting for the company did not advise the company of the date by which the affidavit in opposition to the petition ought to have been filed and it is believed that no substantial injustice was caused to the petitioner by reason of the delay in the filing of the said affidavit.

The debt upon which the petition is based is seriously disputed. The contract in issue was conditional upon both parties approving the samples before shipment. All samples sent tot he petitioner were rejected by it and there was no agreement of the parties on the samples before shipment. Consequently there was no valid and concluded contract capable of enforcement.

That person who purported to enter into the contract on behalf of the company had no authority to do so and purported to act ultra vires the company’s memorandum of association. All disputes arising out of the purported contract should have been referred to arbitration. The company did not in any event breach the purported contract, and that even if it did, which is denied, the quantum of the alleged damages or loss suffered by the petitioner had to be specifically proved.

The application is expressed to be made under r.7 (2) of the Companies Winding Up Rules and 0.44 r.1 of the Civil Procedure Rules. It seems to me that this other order of the Civil Procedure Rules is adverted to by virtue of rule 203 of the Winding Up Rules. It is submitted that section 3A of the Civil Procedure Rules is invoked to meet the

ends of justice.

I accept that this court has power to vary its orders for sufficient reason among other factors to be taken into account. It is urged that jurisdiction to rescind a winding up order is well recognised under the Companies Act. The order can be rescinded if application made promptly and before the order is perfected. The application is said to have been made 11 days after the order as the company was unaware of the circumstances under which the order was made.

It is submitted that the order was irregular as it had been made by misrepresentation of the facts. It was that the company had not filed affidavit in opposition. In certain circumstances verifying affidavit may provide evidence upon which a winding up may be granted. In the instant case the petition was defective and there was no basis upon which the winding up order would have been granted. It must comply with section 221(1) (iii) of the Companies Act Cap 486. That section requires that a petition by a prospective creditor may not be heard until security is given for the costs and also until a prima facie case has been made for winding up of the company.

It is submitted that this petition comes under section 221(1) (iii) as the petitioner was a contingent creditor due to the only and it is only the court that may assess the amount of prospective liability as to its quantum. It is not for the petitioner to put forward a figure and assess its own damages. I am with the Respondent company in this submission. It is for the court to determine the figure of damages.

It would therefore seem that the verifying affidavit verify nothing and the petition in itself does not constitute a prima facie case under section 221(1) (iii) eligible for hearing. It was not disclosed to the court that the petition was brought upon a prospective creditor's claim. They close to deal with technicality of the eligibility of the affidavit.

I think it is a fair submission that it was for the petitioner to disclose the capacity in which it was coming to court. Each capacity had its various legal consequences. A party brings an action based on an assessment for breach is neither entitled to judgment on a normal suit or to a winding up order in a petition.

MWATSAHU Vs. MARO [1967] EA 42. A case where the plaintiff obtained judgment in default of defence for an amount which included the costs of repairing a car. The defendant refused to approve the decree saying it was not a liquidated amount and the registrar had no power to enter judgment in default. It was held that the true nature of the claim was one for pecuniary damages for breach of warranty of title which was not within 0.48 r.1 (2) and therefore the registrar had no power to enter judgment for it.

In Palmer's Company Law Vol. I para. 85-07 it is provided that the creditor's demand must be for a liquidated sum and he cannot serve a demand in respect of a fixed sum less the amount of unliquidated damages claimed by the company in respect of breach of contract. I would agree with the Respondent company that there are no particulars regarding the claim. The Respondent company relies on r.202of the said Winding Up Rules which avoids invalidity of steps on account of informal defects in pleadings. That was the position in the case of JITENDARA BRAHMBHATT Vs. DYNAMICS ENGINEERING Ltd. [1982-88] 1 KAR 1001in which it was held by the Court of Appeal that 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.

It was held further that the petition would be restored for hearing subject to due compliance with Rules.

I have therefore to ascertain if irremediable prejudice or injustice would be suffered by the petitioner in the circumstances that obtain in this case. I agree that failure to comply with the said rules is not fatal unless accompanied by some irremediable injustice which so far has not been shown in order that my discretion to set

aside or review the order complained of is fettered thereby.

The petitioner opposes the application arguing that there is no basis for review of the orders in question. It is submitted that section 221 (1) (iii) of the Companies Act is not applicable as the petition is not by a contingent or prospective creditor. This petition avers that Kshs 1,678,000 is owed and these are the facts the petitioner relies upon. The petition does not have to set out the evidence by which it is required to prove the petitioner. A breach of contract is pleaded which would have been challengeable by an affidavit in opposition.

There is some weight is the Respondent company's submission that there was no avernment to show how that sum of Kshs 1,678,000/= was agreed to be charged to the company. I am therefore of the view that as there is no irremediable prejudice or injustice to be suffered by the petitioner the winding up order is set aside accordingly with costs to the petitioner in any event.

January 23, 1997

Keiwua, J