**Re Sheela Supermarket Ltd**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 23 June 2004

**Case Number:** 54/00

**Before:** Azangalala AJ

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Company law – Winding-up – Procedure – Petition presented together with verifying affidavit –*

*Verifying affidavit not stamped by court – Preliminary objection raised as to validity of petition –*

*Whether petition complied with winding-up Rules – Rule 25 Companies (Winding-up) Rules.*

**RULING**

**AZANGALALA AJ:** This petition came up for hearing before me on 23 March 2004. Mr *Mogeni* counsel for Santowels Limited one of the opposing creditors applied to raise a preliminary objection to the petition. Mr *Nyawara* sought to know the nature of the objection to enable him respond. I therefore adjourned the hearing of this petition to 21 May 2004 and allowed Counsel for the said creditor file his notice of objection to the petition which notice was filed on 22 April 2004. The objection was based on the ground that the petitioner had not complied with the mandatory provisions of rule 25 of the Companies (Winding-up) Rules. Counsel for the said creditor argued that this winding-up petition was filed on 1 December 2000. The petition itself is dated 28 November 2000. Annexed to the petition is a verifying affidavit sworn on 30 November 2000. The verifying affidavit was not stamped by the Court. No other affidavit has been filed subsequent to the filing of the petition. According to counsel the verifying affidavit was sworn and filed contrary to the provisions of rule 25 of the Companies (Winding-up) Rules which regulates presentation of petitions. Counsel therefore argued that there is no valid verifying affidavit. There is therefore no *prima facie* evidence of the contents of the petition. The petition should therefore be struck out. The other advocates for the rest of the opposing creditors associated themselves with the submissions of Mr *Mogeni* for Santowels Ltd. Mr *Nyawara* for the petitioner opposed the preliminary objection arguing that the verifying affidavit was valid and was filed in accordance with rule 25 of the Companies (Winding-up) Rules. If the verifying affidavit has defects the same are curable under Order XVIII, rule 7 and 9 as the creditors shall suffer no prejudice. Counsel relied on the decisions in the following cases. *JM Mugo Investments Company Ltd v Mathu and another* Nairobi High Court civil case number 192 of 2000 (UR) and *Jovenna East Africa Ltd v Onyango and others* [2002] LLR 2016 (CCK). In these cases the plaints were accompanied by defective affidavits but whereas the affidavits were struck out the plaints were not. Mr *Mogeni* in reply submitted that the cases relied upon by counsel for the petitioner were irrelevant as the defective verifying affidavits were filed pursuant to the provisions of the Civil Procedure Rules and not under the Companies (Winding-up) Rules. Rule 25 of the Companies (Winding-up) Rules provides as follows: “25 Every petition shall be verified by an affidavit, which shall be sworn by the petitioner or by one of the petitioners if more than one, or where the petition is presented by a corporation, by a director, secretary or other principal officer thereof and *shall be sworn and filed within four days after the petition is presented, and such affidavit shall be prima facie evidence of the contents of the petition*”. (emphasis mine) The petition in this case was presented on 1 December 2000 verification of this petition by way of an affidavit should have been done within four days of 1 December 2000. The record does not show that an affidavit of any kind was sworn and filed after 1 December 2000. The only affidavit on record is the one sworn on 30 November 2000. There is no court stamp to indicate when it was filed. There is no separate filing fees for the same to show that this affidavit was filed after the presentation of the petition. There is no doubt that it was filed together with the petition to which it is annexed. It is clear therefore that the verifying affidavit sworn on 30 November 2000 was not sworn and filed in accordance with the provisions of rule 25 of the Companies (Winding-up) Rules. The result is that the petition in this case has not been verified by an affidavit. It is the verifying affidavit which is the *prima facie* evidence of the contents of the petition. Counsel for the petitioner opposed the preliminary objection on the basis that the affidavit in this case is defective. Indeed the two authorities relied upon dealt with defective affidavits. The position in this case is quite different. There is no application for leave to swear and file a verifying affidavit out of time. With respect to counsel for the petitioner the position of a plaintiff under the Civil Procedure Rules is quite different from that of a petitioner under the Companies (Winding-up) Rules. In the result, I uphold the preliminary objection and hold that the petitioner has not complied with the mandatory provisions of rule 25 of the Companies (Winding-up) Rules. The petition is hereby struck out with costs. For the petitioner:

*Mr OJ Nyawara* instructed by *PJ Kakad & Co*

For the respondent: