



REPUBLIC OF KENYA



**In re Clarkson & Southern Limited (Winding Up Cause 1
“A” of 2013) [2022] KEHC 11651 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 11651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
WINDING UP CAUSE 1 “A” OF 2013
OA SEWE, J
APRIL 28, 2022
IN THE MATTER OF: CLARKSON & SOUTHERN LIMITED
AND
IN THE MATTER OF: COMPANIES ACT, CHAPTER 486
OF THE LAWS OF KENYA,**

JUDGMENT

- [1] The Petition herein is dated August 12, 2013. It was filed on the 30th September, 2013 by Associated Warehousing Ltd under the *Companies Act* (CAP 486) (repealed) for the orders that it is just and equitable for the company known as Clarkson & Southern Ltd (hereinafter, “the Company”) to be wound up by the Court under the provisions of the *Companies Act*, and that such order be made as the Court shall deem just. The petitioner further prayed that the costs of the Petition and of Mombasa High Court Misc. Civil Application No. 29 of 2013 in relation to an order for substituted service be provided for in priority and paid to it out of the assets of the Company.
- [2] The Petition was supported by the affidavit sworn on August 12, 2013 by Nitichandra Krishnalal Pandya, in which he deposed that the Company was incorporated on April 27, 1959 under the *Companies Act*, Chapter 486 of the Laws of Kenya (now repealed) and bears Company No. C4388. He further averred that the Company was initially known as Arbon Langrish & Southern Limited but subsequently changed its name to H. Clarkson & Southern Limited. Mr. Pandya further averred that the Company filed Mombasa RMCC No. 2501 of 2007 as Clarkson & Southern Limited and has generally transacted as such.
- [3] Mr. Pandya further averred that the Company is indebted to the Petitioner in the sum of Kshs. 1,527,000/= as at 19th March 2012, being assessed costs due and payable by the Company to the Petitioner pursuant to the Certificate of Costs dated 19th March 2012 and issued in Mombasa RMCC No. 2501 of 2007. A copy thereof was annexed to the Supporting Affidavit and marked Annexure “NKP4”. He further stated that a Notice of Demand⁴ was thereafter served by registered post upon the



directors for the Company, namely, Akbarali Karim Kurji, Amirally Hassanali Madhany, and Abdulali Karim Kurji.

- [4] In addition, the Petitioner effected service of the aforementioned notice on the Company by way of advertisement in the Daily Nation newspaper on June 18, 2013, pursuant to an order for substituted service issued by the Court in Misc. Civil Application No. 29 of 2013 on May 29, 2013. A copy of the Court Order and the advertisement were, likewise, annexed to the Supporting Affidavit and marked Annexure “NKP5” and “NKP6”. It was therefore the assertion of Mr. Pandya that, since no payment had been made more than 4 weeks after the demand was made, it was manifest that the Company was insolvent and therefore unable to pay its debts. He explained that, although the Company was aware of the debt, as it participated in the determination of costs, it has persisted in its failure to pay the debt. Mr. Pandya therefore averred that, in the circumstances, it is just and equitable that the Company be wound up.
- [5] In response to the Petition, the Company filed an Affidavit of Opposition sworn on October 22, 2013 by one of its directors, Akbarail Karim Kurji. He conceded that the Company filed Mombasa RMCC No. 2501 of 2007: Clarkson & Southern Company Limited v Associated Warehousing Limited on 7th September 2007; and that a ruling was delivered in the matter on 21st September 2007. He further deposed that, as the Petitioner was dissatisfied with the ruling, it filed an appeal to the High Court, being Mombasa High Court Civil Appeal No. 166 of 2007 in which judgment was delivered in the Petitioner’s favour.
- [6] According to Mr. Kurji, the Company was not notified of the taxation and the issuance of the Certificate of Costs until the same was brought to its attention by the Petitioner. He accordingly asserted that the Winding Up Petition came to them as a surprise; and that the Company took action by challenging the taxation and seeking the setting aside of the proceedings and ruling in that regard; and therefore that the amount claimed was disputed. He further asserted that the Company is far from being insolvent; and that it had a pending case between it and the Petitioner, being Mombasa HCCC NO. 218 of 2007: Associated Warehousing Ltd v Clarkson & Souther Ltd in which the Company which ought to be pursued to its logical conclusion by the Petitioner. It was therefore the assertion of Mr. Kurji that, in the circumstances, the Petition was not filed in good faith; and is therefore an abuse of the process of the Court.
- [7] In a Further Affidavit sworn by Mr. Pandya on November 21, 2013, he reiterated the Petitioner’s assertion that the Company is yet to pay costs as ordered by the Court in the appeal; and that Mr. Kurji had not annexed any bank statement or a portfolio of assets to support his assertion that the Company is solvent. He further stated that a Statutory Demand was duly served on the Company asking it to pay up; and that the costs remain unpaid. Mr. Pandya also pointed out that the Companies Act permits petitions against insolvent companies; and therefore that the Petitioner was under no obligation to consider other alleged options; particularly in the absence of disclosure by the Company as to its assets.
- [8] Mr. Pandya further averred that High Court Civil Suit NO. 218 of 2007 has nothing to do with the costs sought to be recovered in relation to Mombasa RMCC No. 2501 of 2007. He therefore deposed that the Company had the options of either paying the costs that are due to the Petitioner or being wound up.
- [9] The Petition was ultimately fixed for hearing on 9th November 2021; whereupon evidence was led, on behalf of the Petitioner from Nitichandra Krishnalal Pandya. He relied on his Supporting Affidavit and the documents annexed thereto and, in addition produced the following documents as exhibits:
- (a) The original receipt issued by the Registrar General (Exhibit 1)



- (b) The letter dated July 19, 2016(Exhibit 2)
 - (c) The letter dated July 20, 2016from Kinyua Mwaniki & Wainaina Advocates to Kinyua Muyaa & Co. Advocates (Exhibit 3)
 - (d) The email dated July 19, 2016from Samuel Mwaniki to Kinyua Muyaa & Co. Advocates (Exhibit 4)
 - (e) The email from the Petitioner’s advocate forwarding the Ruling on July 22, 2016(Exhibit 5)
 - (f) The ruling in CMCC No. 2501 of 2007 (Exhibit 6)
 - (g) The ruling by the High Court in HCCA No. 166 of 2007 (Exhibit 7)
- [10] On the basis of the foregoing, Mr. Pandya prayed that the Petition be allowed and that the Company, Clarkson & Southern Ltd, be wound up. No evidence was adduced on behalf of the Company.
- [11] Submissions were thereafter filed by learned counsel for the parties. On behalf of the Petitioner, written submissions were filed on 9th March 2022 in which the brief background of the Petition was given. Mr. Kinyua explained that the Company had filed Mombasa RMCC No. 2501 of 2007 to recover beach property then valued at Kshs. 80,000,000/=; and that it obtained *ex parte* orders from a Resident Magistrate’s Court whose pecuniary jurisdiction at the time was Kshs. 50,000/=. He explained tha the Petitioner successfully appealed the decision to the High Court in HCCA No. 166 of 2007 and was awarded costs which were subsequently assessed at Kshs. 1,527,000/=.
- [12] Counsel further submitted that attempts were thereafter made by the Company to have the Petition struck out for being scandalous, vexatious and an abuse of the process of the court. He pointed out that the Company had also contended that there was a dispute as to whether the costs are payable and that the Petitioner had not exhausted other means available to it for realizing the costs. Counsel pointed out that the Petition is unopposed and that the debt remains unpaid for over 15 years nows. Accordingly, counsel prayed that the Petition be allowed and that the Company be wound up as prayed for being unable to pay its debts.
- [13] On behalf of the Company, written submissions were filed herein on November 15, 2021 by Mr. Mwaniki, instructed by M/s Kinyua Mwaniki & Wainaina & Co. Advocates. He reiterated the Company’s posturing that the Petitioner had not exhausted its options by the time this Petition was filed. He consequently submitted that the remedy of winding up should not be used to exert pressure on a debtor to pay, since it has drastic consequences. He relied on *Pride Inn Hotels & Investments Ltd v Tropicana Hotels Limited* [2018] eKLR for the proposition that winding up should be the last resort. He consequently prayed that the Petition be dismissed with costs.
- [14] I have carefully considered the Petition, which was filed prior to the enactment of the Companies Act, No. 17 of 2015 and the Insolvency Act No. 18 of 2015. The jurisdiction of the court to deal with matters concerning the winding up of companies was contained under Section 218 of the repealed Companies Act, Chapter 486, Laws of Kenya. By virtue of Section 734 of the Insolvency Act No. 18 of 2015, the repealed Act is still applicable to all Winding Up Causes, such as this one, that were filed before the repeal aforementioned. Section 218 of the Companies Act, Cap 486 repealed stated thus:

“The High Court shall have jurisdiction to wind up any company registered in Kenya.”



[15] The circumstances in which a company could be wound up by the Court were detailed in section 219 of the repealed Act which read as follows:

219. A company may be wound up by the court if –
- (a) the company has by special resolution resolved that the company be wound up by the court;
 - (b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting;
 - (c) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
 - (d) the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;
 - (e) the company is unable to pay its debts;
 - (f) the court is of opinion that it is just and equitable that the company should be wound up;
 - (g) in the case of a company incorporated outside Kenya and carrying on business in Kenya, winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business.”

[16] Granted the ground relied on by the Petitioner, it is plain that the Petition falls under section 219 (e) of the repealed Act. The Petitioner claims that it is owed Kshs. 1, 527,000.00/= by way of assessed costs in Mombasa RMCC No. 2501 of 2007 which has remained unpaid to date despite demand for payment. In this connection, Section 220 of the repealed Act provided that: -

“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; or
- (b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- (c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

[17] Needless to say that liquidation of a company is a drastic and final blow that invariably spells a death knell for the company concerned; and that it why it is now settled that the same should be done as a final



resort; and not simply for purposes of debt collection. (see *Kenya Cashewnuts Limited – Vs – National Cereals & Produce Board* [2002] 1 KLR 652) Consequently, as was pointed out by Hon. Karanja, JA, in *PrideInn Hotels & Investimetns Ltd v Tropicana Hotels Ltd*[2018] eKLR, before an aggrieved creditor can file a winding up petition against a company, or before the Court can give winding up orders in respect of a company, there must be evidence that all other efforts to recover the debt have failed to yield the desired result.

[18] Hence, in *Intona Ranch Ltd v Joseph Thomas O' Brien* [1992] eKLR it was held:

"...Petition for a winding up order of a company should never be presented as a means of exerting pressure to pay even an admitted debt where there is no evidence of insolvency and inability to meet the debt."

[19] Similarly, in *Re Lympne Investments Ltd* [1972] 2 ALL ER it was stated that:

"The effects on a Company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the Company's head while that litigation is fought."

[20] It is with the foregoing in mind that I have considered the evidence of PW1. While that evidence proved that the Company is indeed indebted to the Petitioner by way of costs awarded in Mombasa RMCC No. 2501 of 2007, it fell short of demonstrating that winding up was the only recourse available to the Petitioner as at the time of filing the Petition. Indeed, in cross-examination, PW1 conceded that:

"The directors of the Petitioner did not seek to have the directors of Clarkson & Southern Ltd examined as to the assets of their company. We did not apply for warrants of attachment & sale before the lower court..."

[21] In the premises, the Petitioner has not convincingly demonstrated that the Respondent is unable to pay its debts for purposes of Section 220(c) of the repealed Companies Act. Having conceded that it neither sought to ascertain the assets of the Company; nor applied for warrants of attachment and sale of the Companies Assets, it is my resultant finding that this Petition for winding up was brought for the purposes of exerting pressure on the Company to pay the debt. In the circumstances an order winding up the company is not warranted.

[22] In the result, the Petition dated August 12, 2013 is untenable and is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF APRIL 2022.

OLGA SEWE

JUDGE

