



IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY CAUSE NO. E005 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

KITMIN HOLDINGS LIMITED

BETWEEN

NOBLE RESOURCES INTERNATIONAL PTE LIMITED.....PETITIONER

AND

KITMIN HOLDINGS LIMITED.....RESPONDENT

AND

SHAMIT VARMA.....1<sup>ST</sup> INTERESTED PARTY

NCBA BANK PLC.....2<sup>ND</sup> INTERESTED PARTY

**RULING NO. 2**

1. Following the hearing of the Petitioner's Liquidation Petition, I delivered the Judgment dated 26<sup>th</sup> March 2021 where I issued the following orders:

a. An Interim Liquidation Order be and is hereby issued but the same is suspended for a period of ninety (90) days from the date hereof.

b. The issue of costs is hereby reserved pending further orders.

2. On 20<sup>th</sup> August 2021, the parties informed the court that the Respondent ("the Company") had paid USD 150,000 in full and final settlement of the debt due to the Petitioner. I consequently discharged the Interim Liquidation Order absolutely. The parties were however, unable to agree on the issue of costs which I had reserved in the judgment. The advocates made oral arguments in support of their respective positions.

3. Counsel for the Company, Mr Mohochi, submitted that since the matter had been settled amicably, each party should bear its own costs. He pointed out that the Petitioner had not sought costs in the petition. He urged the court to consider the circumstances leading to the litigation, the fact that there was no outright winner in the matter and the need to provide the parties an avenue for reconciliation in line with **Article 159(2)(c)** of the Constitution which urges the court to promote alternative dispute resolution. Counsel informed the court that in complying with the court orders, the Company had to seek a facility for the sum of USD 150,000 causing it to incur additional costs of USD 50,000. In the circumstances, the Company urges the court not to impose costs on it.

4. In response, Mr Ndung'u, Counsel for the Petitioner, agreed that the court should consider the circumstances of the case in deciding whether or not to award costs. Counsel submitted that given the history of the matter which culminated in the filing of the liquidation petition entitled the Petitioner to costs which it had in fact sought in its petition. Counsel submitted that under **section 27(1)** of the *Civil Procedure*

**Rules**, the Petitioner, as the successful party, was entitled to costs and that the Company had not shown why the Petitioner was not entitled to costs.

5. The award of costs in civil matters is governed by **section 27** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which states as follows:

27(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

6. The Supreme Court in **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others SCK Petition No. 4 of 2012 [2014] eKLR** re-iterated the general principle in **section 27** of the **Civil Procedure Act** and set out the following conclusion:

[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

7. The question then is whether the Company should pay costs to the successful Petitioner where the Company subsequently admitted and settled the claim. In answering this question, I agree with both parties that the circumstances leading to the filing of the case, which I will outline briefly, are relevant.

8. The genesis of the Petitioner’s case is an agreement dated 14<sup>th</sup> January 2014 (“the Agreement”) in which the Petitioner agreed to buy, and the Company agreed to sell, certain quantities of ‘chrome ore lumpy’. The Agreement was amended from time to time and by a further agreement dated 30<sup>th</sup> December 2014, the Company and the Petitioner entered into a further addendum to the Agreement wherein it was agreed that the ‘outstanding repayment amount of USD 200,000 would be settled by the Company by repaying a minimum amount of USD 10,000 per month. Thereafter, the Company paid the Petitioner USD 30,000.’

9. The Company failed to pay the balance of USD 170,000 whereupon the Petitioner, through its attorney in South Africa, sent a letter of demand dated 20<sup>th</sup> November 2015. The Company responded through its advocate, *R. M. Mutiso*, by a letter dated 9<sup>th</sup> December 2015 admitting that the sum of USD 200,000 had been advanced by the Petitioner to the Company but stated that the correct amount due was USD 160,000 not USD 170,000.

10. The Company thereafter proposed repaying the Petitioner USD 5,000 per month starting sometime in July 2015 until payment in full. Efforts by the parties to formalise this proposal, were not successful. The Company, however, made two payments of USD 5,000 on 18<sup>th</sup> July 2016 and 16<sup>th</sup> August 2016 respectively.

11. In April 2017, the Petitioner issued a statutory demand to the Company in terms of **section 384** of the **Insolvency Act No. 28 of 2015** (the ‘**Insolvency Act**’) demanding payment of the outstanding sum of USD 150,000 plus interest due to the Petitioner. In order to forestall the filing of a liquidation petition, the Company filed suit against the Petitioner in **Milimani High Court Civil Case No. 179 of 2017 Kitmin Holdings Ltd v Noble Resources International PTE Limited**. The suit was accompanied by an interlocutory application seeking to restrain the Petitioner from commencing insolvency proceedings against it. Tuiyott J., dismissed the application on 7<sup>th</sup> June 2018. The Company thereafter filed another application seeking to restrain the Petitioner from commencing liquidation proceedings against it pending the hearing and determination of the intended appeal. Tuiyott J., delivered a ruling on 18<sup>th</sup> January 2019 granting the injunction on condition that the Petitioner would pay the debt in instalments. The Company failed to comply with the terms of the injunction whereupon the Petitioner served another statutory demand dated 9<sup>th</sup> December 2019 under **section 384** of the **Insolvency Act** demanding payment of USD 150,000. The Company failed to comply with the demand leading to the filing of this liquidation petition on the ground that the Company was unable to pay its debts.

12. As I stated earlier, the Company filed a Notice of Motion dated 28<sup>th</sup> April 2020 seeking to strike out the petition but I dismissed the application by a ruling dated 17<sup>th</sup> August 2020 thus paving way for hearing of the petition and the judgment.

13. From the aforesaid facts, it is clear that Company has been indebted to the Petitioner since 2014, it admitted the debt and in fact proposed to pay it. It then filed a suit to restrain presentation of the petition but failed on that account when the judge granted a conditional injunction. The Company failed to comply with the conditions imposed by the court. In my view, the Company had sufficient opportunity to resolve the debt but its failure to do so forced the Petitioner to file this Petition leading to the Interim Liquidation Order. I do not think that the Company should be rewarded by being excused from paying costs when its action of failing to not only pay the debt but also comply with terms issued by the court compelled the Petitioner to file this Petition. It was in the Company’s hands to invoke reconciliation by paying the debt but it only did so when the consequences of its inaction were too clear and grave.

14. At the end of the day, the Company caused the Petitioner to incur costs in defending a matter the Company had filed to avoid the debt and which, I dare say is still pending determination before this court. The Petitioner also incurred costs in filing and successfully prosecuting this petition. I therefore find and hold that the Company has not discharged its burden of showing or demonstrating that the court should depart from the general principle that costs should follow the event.

15. For the reasons I have set out, I now order as follows:

**a. The Interim Liquidation Order issued on 26<sup>th</sup> March 2021 be and is hereby discharged absolutely.**

**b. The Respondent shall bear the costs of this petition to be agreed upon or taxed.**

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF AUGUST 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Ndung'u instructed by Coulson Harney LLP for the Petitioner.

Mr Mohochi instructed by Mohochi and Company Advocates for the Respondent.