



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

[Coram: A. C. Mrima, J.]

WINDING UP CAUSE NO. 2 OF 2019

BETWEEN

IN THE MATTER OF VALEOPO GENERAL AGENCIES LTD

AND

IN THE MATTER OF SECTION 219 OF THE COMPANIES ACT CHAPTER 486 LAWS OF KENYA - REPEALED

AND

IN THE MATTER OF SECTION 424 (E), 425(B) AND 734 (2) OF THE INSOLVENCY ACT NO. 18 OF 2015

JUDGMENT

1. *Masline Adhiambo t/a Ellyams Enterprises* (hereinafter referred to as '**the Petitioner**') filed a Winding Up Petition against *Valeopo General Agencies Limited* (hereinafter referred to as '**the Company**'). The Petition was dated 14/10/2019. It was supported by the Verifying Affidavit of the Petitioner sworn on 14/10/2019 and a Supplementary Affidavit sworn by *George O. Anyumba*, Counsel on 10/03/2020.
2. The basis of the Petition was the inability of the Company to satisfy a Court decree against it. The decree arose from *Rongo PMCC No. 157 of 2012 Masline Adhiambo t/a Ellyams Enterprises vs. Valentine Opiyo and Valeopo General Agencies Limited*. The trial court entered judgment against the two Defendants in the sum of Kshs. 792,742/= with costs and interest. That was on 14/01/2014.
3. The Defendants appealed the judgment. They filed *Homa Bay High Court Civil Appeal No. 2 of 2014 Valentine Opiyo and Valeopo General Agencies Limited vs. Masline Adhiambo t/a Ellyams Enterprises*. The appeal was heard and determined on 24/11/2014. The appeal was partly allowed against Valentine Opiyo for the reason that Valentine Opiyo was an agent of a known and disclosed principal. The Company was held to be indebted to the Petitioner. It therefore had the duty to satisfy the decree solely.
4. The Petitioner attempted to execute the decree against the Company in vain. At one point the Petitioner unsuccessfully took out a Notice to Show Cause against Valentine Opiyo.
5. Having laboured in vain towards the satisfaction of the decree the Petitioner decided to and issued a notice of intended winding up of the Company. The notice was dated 23/05/2017. The notice gave a 30-day window to the Company to pay up or face winding up proceedings.
6. The threat did not bear any fruits. The Petitioner eventually filed the Petition. By then the original decree had remained unsatisfied for 5 years. The Petitioner properly demonstrated that the Company was still a going-concern.
7. The Petition was on several occasions duly served upon the Company. The Company did not take part in the proceedings. The Petition was hence undefended.
8. Despite the fact that the Petition was undefended the Petitioner still had the duty to prove that the Petition be allowed. In **Intona Ranch Ltd vs. O'Brien (1992) KLR 1** the Court of Appeal expressly stated that: -

It is settled law that the winding up order is not automatic. There must be proof of insolvency and/or inability on the part of the Company to pay its debts.

9. The Petitioner contended that the Company ought to be liquidated by the Court because it was not able to satisfy the court decree against it.

10. Section 424(1)(e) of the Insolvency Act No. 18 of 2015 (hereinafter referred to as 'the Insolvency Act') provides as follows: -

(1) A company may be liquidated by the Court if –

(a)

.....

(b)

(c)

(e) The company is unable to pay its debts;

11. Section 384 of the Insolvency Act provides for the circumstances in which a company may be deemed unable to pay its debts. The provision states as follows: -

(1) For purposes of this Part, a company is unable to pay its debts-

a) if a creditor (by assignment of otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor.

b) if execution or other process issued on a judgments, 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 as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

(3)The insolvency regulations may increase or reduce the amount specified in subsection (1) (a).

12. There is no doubt that there is a Court decree against the Company. The decree still remains unsatisfied to date despite numerous attempts. Therefore, pursuant to Section 384(1)(b) of the Insolvency Act the Petitioner demonstrated that the Company was unable to pay its debts for its failure to satisfy the court decree against it.

13. That is a solid ground for a liquidation order. The Court of Appeal in a majority judgment in Mombasa Civil Appeal No. 98 of 2017 Pride Inn Hotels & Investments Limited vs. Tropical Hotels Limited (2018) eKLR clearly expressed itself as under: -

38. This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

14. Based on the foregone analysis of the evidence and the law this Court hereby enters judgment for the Petitioner in the following terms: -

(a) The Company, Valeopo General Agencies Limited, has shown inability to satisfy the Court decree in *Rongo PMCC No. 157 of 2012 Masline Adhiambo t/a Ellyams Enterprises vs. Valentine Opiyo and Valeopo General Agencies Limited* which decree was re-affirmed in *Homa Bay High Court Civil Appeal No. 2 of 2014 Valentine Opiyo and Valeopo General Agencies Limited vs. Masline Adhiambo t/a Ellyams Enterprises* in favour of the Petitioner herein, *Masline Adhiambo t/a Ellyams Enterprises* in the sum of Kshs. 792,742/= together with costs and interests as from 14/01/2014 and as such the Company, Valeopo General Agencies Limited, is hereby placed into liquidation until such decree shall have been satisfied or otherwise discharged.

(b) The Official Receiver is hereby appointed as the interim liquidator of the Company.

(c) The Company shall bear the costs of the suit.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of May 2020.

A. C. MRIMA

JUDGE

Judgment delivered electronically through: -

1. **ganyumba@gmail.com** for Messrs. Anyumba & Associates Advocates for the Petitioner.
2. No appearance for the Company.
3. Parties are at liberty to obtain hard copies of the Judgment from the Registry upon payment of the requisite charges.

A. C. MRIMA

JUDGE