



**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**

**IN THE MATTER OF KITMIN HOLDINGS LIMITED**

**And**

**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**

**Introduction and background**

1. The subject of this ruling is the respondent’s application to strike out the liquidation petition. The facts upon which the liquidation petition is based are set out in the petition dated 7<sup>th</sup> February 2020 and can be summarized as follows.
2. Kitmin Holdings Limited (“the Company”) was incorporated on 3<sup>rd</sup> November 1998 with a nominal capital of KES 1,000,000 divided into 50,000 shares of KES 20 each. Among the objects for which the Company was established is to engage in the mining industry through supply of crucial minerals to cement factories.
3. 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.
4. 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, RM Mutiso, by a letter dated 9<sup>th</sup> December 2015 admitted 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.
5. 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.

6. In April 2017, the petitioner issued a statutory demand (the 'first 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.

7. 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 ("HC COMM No. 179 of 2017")**. 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 subject to the following conditions:

1. That the company would pay to the petitioner the sum of USD 75,000 being half of the debt owing, within 90 days of the date of the court's ruling (on or before 18 April 2019);
2. The company would thereafter pay to the petitioner monthly instalments of USD 10,000 per month until full and final payment of the debt; and
3. Failure to comply with these conditions would have the effect of the injunction being lifted.

8. The Company failed to comply with the terms of the injunction whereupon the Petitioner has served a 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 pay comply with the demand leading to the filing of this liquidation petition on the ground that the Company is unable to pay its debts.

### **The Application**

9. Following the filing and service of the petition, the Company filed a Notice of Motion dated 28<sup>th</sup> April 2020 seeking, in the main, the following reliefs:

[1] Spent

[2] Spent

[3] Spent

[4] THAT an Order be issued directing the Respondent (Petitioner-Creditor) to deposit in Court within 30 days, the sum of Kshs. 500,000 or such security as is sufficient to cover the Applicant-Company's costs in the Petition and failure to deposit security in the specified period, the petition be dismissed.

[5] THAT the Verifying Affidavit in Support of the Petition Sworn and dated on 7<sup>th</sup> February 2020 by Michelle Hayes, be struck out for being ex-facie incompetent, fatally defective and inadmissible as a Verifying Affidavit.

[6] THAT the Insolvency Petition No E 005 of 2020, dated 7<sup>th</sup> February 2020 be struck out, for ex facie failing to demonstrate that the Petition if granted as Prayed, shall fulfil and satisfy the guiding principles, the objects, and application of the Insolvency Act 2015 thus an abuse of the court process.

[7] THAT the Insolvency Petition No. E 005 of 2020 dated 7<sup>th</sup> February 2020 be struck out for contravening Regulation 77B of the Insolvency (Amendment) Regulations 2018.

[8] THAT the Insolvency Petition No E005 of 2020 dated 7<sup>th</sup> February 2020 be struck out, for ex facie failing to demonstrate of the Applicant Company both "Inability to pay" and Insolvency "beyond redeemability" being the primary principles, for consideration and determination when granting the Prayer(s) as sought thus, an abuse of the court process.

[9] THAT in the unlikely event, the court finds that All the defects in the Petition are curable by amendment, that the Court be pleased to Order that the matter be stayed to enable the parties exhaust the agreed existing dispute resolution mechanism, the Singapore International Arbitration Center (SIAC) and a return thereof be filed within 6 months from the dated of the Court Order.

[10] THAT the costs of this Application be provided for.

10. The application is supported by the grounds on the face of the application and the supporting and supplementary affidavits of Poonam Varma, a director of the Company, sworn on 28<sup>th</sup> April 2020 and 6<sup>th</sup> July 2020 respectively. A Creditor, NCBA Bank Kenya PLC, supported the application through the affidavit of Stephen Atenya, a Senior Legal Officer, sworn on 15<sup>th</sup> July 2020. The application is also supported by Shamit Varma, who refers to herself as an objector/interested party, sworn on 3<sup>rd</sup> July 2020. The application is opposed by the Petitioner through the replying affidavit of Michelle Hayes, an employee of the Petitioner, sworn on 15<sup>th</sup> June 2020.

## Matters in issue

11. The parties also filed written submissions in support of their respective positions. Their advocates also highlighted the same at the hearing. I propose to consider those depositions and submissions in light of the following issues which arise from the prayers sought in the application:

- a. Whether the court should order security for costs.
- b. Whether the petitioner should be struck out on account of a defective verifying affidavit.
- c. Whether the petitioner should be struck out for failure to comply with *Regulation 77B of the Insolvency (Amendment) Regulations 2018*.
- d. Whether the petition should be struck out for failing to disclose that the Company is unable to pay its debt.

## Determination

### Whether the court should order security for costs

12. From the deposition and submissions, it is apparent that the Company did not press this issue. The guiding principle as to whether the court should grant an order for security of costs were aptly stated by Okwany J., in the *Scotch Whisky Association & 2 others v Africa Spirits Limited HC COMM NO. 502 OF 2017 [2020] eKLR* as follows;

[9] The purpose of an order for security for costs is to protect the Defendant from situations in which he is dragged to Court, and made to lose even the costs of litigation. It is also meant to prevent frivolous and useless litigation by persons. Courts are however required to ensure that parties with just claims are not prevented from accessing the seat of justice for their claims to be determined.

[10] It is trite law that security for costs can be ordered by a trial Court in its discretionary power. In the case of *Marco Tools & Explosives Ltd v Mamujee Brothers Ltd, [1988] KLR 730* it was held:

“...the Court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest”.

13. I would only state that this petition is a logical consequence of the decision of the court in *HC COMM No. 179 of 2017* in which the court declined to restrain the presentation of a liquidation petition against the Company. I therefore cannot say that the petition is entirely frivolous or devoid of merit and I do not think there is any reason why I should order security for costs.

### Non compliance with Insolvency (Amendment) Regulations, 2019 and defective verifying affidavit.

14. Counsel for the Company submitted that the petition before the Court, not being a petition for voluntary liquidation, must have been brought under **sections 424(1)(d) and 435(1)(b)** of the *Insolvency Act* alleging that the Company is unable to pay its debts and is insolvent beyond redeemability. In the circumstances, the Company submitted that the petition must strictly comply with the provisions of **Regulation 77B(2)(b) of the Insolvency Act (Amendment) Regulations, 2018** which provides as follows:

77B. (1) For purposes of section 425 of the Act an application for liquidation shall be –

- a. By way of a petition in Form 32C as set out in the First Schedule; and
- b. Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.

(2) The petition for liquidation shall be accompanied by the following documentation-

- (a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and
- (b) a statement of financial position in Form 32 as set out in the First Schedule where necessary. [Emphasis mine]

15. Counsel for the Petitioner submitted that the filing of a financial statement was not a mandatory requirement. Counsel referred to my decision in *East Africa Cables Limited v SBM Bank (K) Ltd HC COMM IP No. E171 of 2020 [2020] eKLR* where I dealt with the same objection and held as follows:

[14] The question for consideration is whether the petition is in the form required and accompanied by a verifying affidavit and whether it was accompanied by the statutory demand in the Form 32E. I do not think a statement of financial position in Form 32 is required to accompany the petition by a creditor as a creditor would not be in a position to know the financial status of a company and provide the details required in Form 32. It applies to a petition by the company for voluntary liquidation which in those circumstances is required to disclose its financial position under **Regulation 77A of the Regulations, 2016**.

16. I do not see any reason to depart from my own decision. In addition, **Rule 77B** aforesaid states that statement of financial affairs shall

accompany the petition, “where necessary.” It is thus not necessary in a creditor’s petition. Finally, such an omission, if indeed it is, is curable under **section 696** of the **Insolvency Act** which states as follows:

696 (1) A proceeding under this Act may not be invalidated or set aside for a defect in a step that is required to be taken as part of, or in connection with, the proceeding, unless a person is detrimentally affected by the defect.

17. The Company complained that the verifying affidavit in support of the petition is defective. The affidavit is sworn by Michelle Hayes, who depones that she is employed by Noble Resources SA Proprietary Limited, the South Africa subsidiary of Noble Resources International PTE Ltd. The Company argued that the deponent has not shown that she has the authority to sue by providing the necessary authorization and that the affidavit is defective for want of notarization.

18. Counsel for the petitioner resisted this plea to strike out the verifying affidavit for want of authority on the grounds that this was not fatal and that the court had jurisdiction to order that the deponent file a proper affidavit.

19. For the reasons I have stated earlier, I do not find any defect that cannot be cured or remedied (see **Leo Investments Ltd v Trident Insurance Company Ltd HC COMM No. 893 of 2010 [2014] eKLR**). I say so because, this subject matter of this petition has been litigated in other proceedings hence the element of prejudice is somewhat diminished. In order satisfy the Company that the deponent of the verifying affidavit has authority, I direct that the Petitioner to file and serve a further verifying affidavit demonstrating that that the deponent has the authority of the Petitioner to file the petition.

#### **Whether the petition should be struck out**

20. The Company’s position is that Petitioner has not demonstrated that the Company is unable to pay its debts hence the court ought to strike out the petition. Counsel further submitted in the absence of a financial statement, the court would not be in a position to adjudge the financial position of the Company and its ability to pay the Petitioner which is a contingent and unsecured creditor. Counsel relied on the case of **Kenya Power and Lighting Company Limited v Matic General Contractors Ltd [2002] eKLR** to submit that the petition is an abuse of the court process.

21. The Company also relied on the fact that all its assets are the subject of a line by the secured creditor and should a liquidation order be made; the petitioner shall may not recover the alleged debt. This position is buttressed by the position taken by NCBA Bank which opposed the petition.

22. The Petitioner’s position is that it has complied with all the conditions for presentation of a petition for liquidation and that it has a prima facie case which ought to proceed for trial. Counsel referred to **Success Electronic and Transformer Manufacturers Limited v Kilewah Electro Hard and Electronic Limited HC COMM IP No. 034 of 2019 [2020] eKLR** where the court declined to strike out a petition once the conditions precedent to filing the petition had been met.

23. At this stage, I am asked to strike out the petition. The general and accepted principle is that the court should be reluctant to strike out a pleading if the procedural requirements have been met and there are triable issue (see **D.T. Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1**). In this case, the court hands are tied as the Company is estopped from denying that it is not indebted to the Petitioner or that this petition cannot be presented. As I stated earlier, this petition is a logical progression of the decision of Tuiyott J., in **HC COMM No. 179 of 2017** where he declined to restrain the petitioner from presenting the liquidation petition.

24. In the ruling dated 7<sup>th</sup> June 2018, Tuiyott J., expressed the following view regarding the debt that is now subject of this petition:

30. This chronology of events demonstrates that the debt has been outstanding from, at least, 30<sup>th</sup> December 2014. This would be 28 months before the Statutory Demand was issued. The Creditor has indulged the Plaintiff on several occasions. The Plaintiff has neither paid the debt nor made proposals on how to secure it. Given the overall circumstances of this case, is the Creditor to pursue recovery of this undisputed debt through Arbitration or a Civil Suit or further negotiations? I am afraid I cannot find Prima Facie evidence that the conduct of the Defendant in pressing on with the Liquidation of the Plaintiff is improper or oppressive or intended to achieve a collateral or malicious purpose.

25. As the Company did not comply with the conditions for stay issued by the Court following dismissal of its application, can it now argue that it is in a position to pay its debts? This is an issue that will be dealt with at the hearing of the petition bearing in mind that at the end, the Court under **section 427** of the **Insolvency Act** may make several orders including an order to dismiss the petition, adjourn the hearing conditionally or unconditionally, make an interim liquidation order or any other order that fits the circumstances of the case. These provisions show that unlike, under the old regime of law, liquidation is not the only option available for the court after hearing the petition.

26. I would also mention that the fact that the Company’s assets are held by NCBA Bank as security is not a reason for the striking out the petition. In fact, **section 427** of the **Insolvency Act** is clear that the court may not refuse to make a liquidation order merely on the ground that the company’s assets are mortgaged or that it has no assets. In any case, the law is that the rights of a debenture holder or secured creditor are unaffected by the process of liquidation (see **Re: High-Plast Limited ML HC IP No. E001 of 2019 [2019] eKLR** and **East Africa Cables Limited v SBM Bank (K) Ltd HC COMM IP No. E171 of 2020 (Ruling No. 3) [2020] eKLR**).

#### **Disposition**

27. The Notice of Motion dated 28<sup>th</sup> April 2020 is dismissed with costs to the Petitioner. I now invite the parties to take direction on the hearing of the petition.

28. I also direct the Petitioner to file a further affidavit confirming the authority of the Michelle Hayes to file a verifying affidavit within 21 days from the date of this decision.

**DATED** and **DELIVERED** at **NAIROBI** this **17<sup>th</sup>** day of **AUGUST** 2020.

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

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

Mr Muhochi instructed by Mohochi and Company Advocates for the Company

Mr Okubasu instructed by Okubasu, Munene and Kazungu LLP Advocates for 1<sup>st</sup> Interested Party (Shamit Varma)

Ms Mungai instructed by Kimondo, Gachoka and Company Advocates for the 2<sup>nd</sup> Interested Party (NCBA PLC)