



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**INSOLVENCY PETITION NO. E011 OF 2020**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND IN THE MATTER OF**

**TODDY CIVIL ENGINEERING COMPANY LIMITED**

**BETWEEN**

**PRIME STEEL ENGINEERING COMPANY LIMITED.....PETITIONER**

**AND**

**TODDY CIVIL ENGINEERING COMPANY LIMITED .....RESPONDENT**

**RULING**

1. The Petitioner lodged the Petition dated 21<sup>st</sup> July 2020 seeking an order winding up, now referred to as a liquidation, of the Respondent (“the Company”) under the *Insolvency Act, 2015* on account of an unpaid debt of Kshs. 787,421.04/-.
2. The Company opposed the Petition through the replying affidavit of its director, Antony Mwaura Ng’ang’a, sworn on 24<sup>th</sup> August 2020. It also filed an application by way of Notice of Motion dated 24<sup>th</sup> August 2020 under **section 10** of the *Insolvency Regulations, 2016* seeking an order restraining the Petitioner from advertising the Petition and an order seeking to strike the Petition for being an abuse of the court process.
3. The application is supported by the affidavits of Antony Mwaura Ng’ang’a sworn on 24<sup>th</sup> August 2020 and 14<sup>th</sup> September 2020 respectively. It is opposed by the Petitioner through the replying affidavit of its Director of Sales, Chetan Kumar Rameshbhai Patel, sworn on 8<sup>th</sup> September 2020.
4. It is common ground from the petition and depositions filed that the parties entered into a contract for the supply of steel bars/rods. The Company paid the Petitioner Kshs. 1,811,474.00. The point of departure is that the Petitioner now claims Kshs. 787,421.04 as accrued interest which the Company denies.
5. The Petitioner’s case is grounded on the terms and conditions set out on page 2 of the invoices **INV-A-6134/2016** and **INV-B-4835/2016** which states as follows at para 9:

*If the customer does not make a payment of an undisputed amount by the due date, then the customer shall pay the supplier interest at the interest rate of 1.5% per month or part thereof thereafter until debt is paid in full.*

6. On the basis of the interest accrued from the invoices, the Petitioner contends that the Company owes it Kshs. 787,421.04/- together with interest at court rates from the date of filing this petition. Counsel for the Petitioner contended that the conditions on interest set out in the invoices were part of the contract. He cited the Court of Appeal decisions in *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another NBI CA Civil Appeal No. 35 of 1999 [2001] eKLR* and *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited NRB CA Civil Appeal No. 282 of 2004* to emphasise the position that courts are bound to enforce the contract between the parties and cannot re-write it.

7. The Company's position is that the claim for 1.5% interest per month until the debt is paid in full was never part of the contract documents or terms of the contract. It stated that the agreed terms are set out on the face of invoice numbers **INV-A-6134/2016** and **INV-B-4835/2016** and these terms do not include the interest claimed by the Petitioner.

8. I have looked at the subject invoices, which the Company has admitted, and which on their face state the following, "Conditions of Sale":

- *Accounts are due on demand or strictly 30 days for approved accounts*
- *Goods once sold will not be exchanged or taken back*
- *Any claims on condition or shortage must be notified at the time of Delivery*
- *Goods invoiced herein are dispatched for account and risk of buyer*
- *No responsibility is taken by us for any loss or damage in transit*
- *The Company shall have general as well as particular lien on all goods for unpaid account*

9. From the above conditions, it is clear that there is no provision for charging a 1.5% interest rate on any unpaid invoices or delayed payment on the face of the invoices. The Petitioner relies on a second page which, at paragraph 9, shows that interest is chargeable. Whether this page is part of the conditions of sale incorporated in the contract is clearly a matter for trial. I say so because the invoices signed on behalf of the Company do not allude to or incorporate other terms on the face of it.

10. The thrust of the Company's application is that the petition is grounded on a disputed debt hence the court should strike out the petition. Counsel for the Company cited **Re Gilani Butchery Limited NRB HCWC No. 8 of 2003 [2004] eKLR** and **Re Turbo Highway Eldoret Limited NRB HCWC No. 32 of 2015 [2016] eKLR** to support the principle that the court should not entertain a winding up petition which is based on a disputed debt and where the Company is in a position to pay its debt.

11. In **Universal Hardware Limited v African Safari Club Limited MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR**, Makhandia JA., giving the lead judgment of the Court of Appeal, summarized the position regarding striking out a petition on account of a disputed debt. He observed that:

*The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.*

After analyzing several decisions including **Mann v Goldstein [1968] 2 All ER 769**, **Crusair Limited v CMC Aviation Ltd (No. 2) [1978] KLR 131** and **Re: Global Tours and Travels Limited [2001] 1 EA 195**, the learned Judge concluded that:

*The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.*

12. Having examined the invoices submitted by the Petitioner, I cannot say the Company's defence is threadbare. It is a bonafide and substantial defence to the claim. This claim therefore is better suited for resolution by the ordinary courts and not through a liquidation petition.

13. Finally, the Company has demonstrated that it is a going concern handling substantial construction contracts all over the country for example, it is executing a contract on behalf of **Athi Water Works Development Agency** dated 19<sup>th</sup> July 2019 worth Kshs. 1,195,632,454.94 for the **Construction of Ruiru-Juja Greater Githurai Water Supply System**. The Company has also attached its Audited Accounts for 2016, 2017 and 2018 together with its banks statement all showing it is solvent. The Petitioner has not controverted this evidence or shown that the Company is insolvent and should be liquidated. The fact that the Company has paid the principal debt negates the position that it is insolvent and only goes to buttress the position that the petition is intended to exert pressure on it to resolve the matter.

14. I have warned myself that the power to strike out a pleading should be exercised with circumspection. Indeed, in **Brahmbhatt v Dynamics Engineering Ltd [1986] KLR 133**, the Court of Appeal held that;

*In an application to strike out a winding up petition, the court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail.'*

15. However, having considered all the facts of this case, I am guided by what the court stated in **Matic General Contractors Limited v The Kenya Power and Lighting Company Limited [2001] LLR 4837 (CAK)** that;

*It is thoroughly settled now that, on a petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Acts to be made the vehicle of oppression.*

16. For the reasons I have set out above, it must now be clear that the liquidation petition calls for striking out. The Notice of Motion dated 24<sup>th</sup> August 2020 is allowed on terms that the petition herein is struck out with costs to the Company.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of NOVEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Orare instructed by Olendo Orare and Samba Advocates LLP

Mr Wanyama instructed by Walubengo Waningilo and Company Advocates for the Company.