REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 31 OF 2019

SAWAND CARE PRODUCTS LTD.....PLAINTIFF

VERSUS

NESTLE KENYA LIMITED.....DEFENDANT

R U L I N G

1. On the 2.5.2019 the plaintiff sued the defendant and sought an order that the defendant be restrained by a permanent injunction from presenting or instituting any liquidation proceedings against the plaintiff on the foot and strength of the statutory Notice dated the 4.4.2019. The dispute between the parties' is disclosed to revolve around trade accounts for the period between the 1.3.2016 and 31.3.2018.

2. During the period pleaded, the parties dealt pursuant to a document called '**Distributorship Agreement**' dated the 20.9.2016. The pleadings on record reveal that after the agreement came to its termination the parties could not agree on the outstanding accounts hence the defendant demanded payment which was disputed by the plaintiff hence parties sought to reconcile the accounts but before a settlement could be reached, the served a notice of intention to wind up the plaintiff.

3. Simultaneous with the plaint was filed an application for a temporary injunction on the same terms of the prayer in the plaint but pending the hearing and determination of the suit. The grounds advanced to premise the application and disclosed on the face of the Notice of Motion as well as in the Affidavit in support and supplementary Affidavit, both sworn by one Samwel Wambugu, were that the defendants had maliciously and in bad faith issued the statutory notice yet the plaintiff had raised issues with irregularities on the accounts rendered including invoices for April and May 2018 when in fact the agreement had come to its contractual end by the effluxion of time at the end of March 2018. It was contended that parties agreed to reconcile accounts so that the sum owed be paid but the defendant issued two different demand notices for Kshs. 24,244,160.09 and Kshs.17,436,329.87 closely followed by the statutory notice before the exercise could be completed. On those grounds the plaintiff contended that the defendant was improperly invoking liquidation jurisdiction of the court as a debt collection tool away from normal civil litigation.

4. The defendant, when served not only filed a statement of defence but also ground of opposition and a replying Affidavit sworn by one Edwin Mukagati. The gist of the opposition to the application was that the plaintiff had in fact admitted owing the sum of Kshs 21,433,854.87 and undertook to pay by a proposed plan without so paying and had therefore shown inability to pay justly owed debt as defined under the insolvency Act. To the defendant, the plaintiff invited the operations of the Insolvency law. It was added that the plaintiff had come to court seeking an equitable remedy with tainted hands in that it concealed from the court the fact that by a letter dated 31.8.2018 it had admitted a specific sum and gave a payment plan which it had not fulfilled. For those reasons the defendant took the position that the suit and the application were bad for being *mala fides* and failed to meet the thresholds for grant of a temporary injunction set out in the decision of **Giella vs Casman Brown (1973) 1 EA 358** and reiterated in **KCB vs Afraha Educational Society (2001)1EA 86.**

5. The Replying affidavit on its part exhibited the contract between the parties as well as the invoices for good allegedly ordered and supplied, correspondence between the two parties and their respective counsel as well as the statutory notice giving rise to the suit**.** Of interest to court for this determination are the letter between the parties and their counsel particularly the letter dated 31.8.2018 marked **EM5** in which it was admitted that after reconciliation the sum of **Kshs 21, 433, 854.87** and proposing to pay in four installments ending by December 2018 and the ensuing notices.

6. Parties opted to canvass the application by written submissions Which were then highlighted orally in court? The plaintiff's written submissions are dated 17.7.2019 together with the bundle of authorities dated 13.5.2019 while the defendant submissions are dated 25.7.2018 and bound together with authorities relied upon.

7. I have had the benefit of reading the materials filed together with the submissions offered in line with the authorities cited to court and I am of the view that the only issue is whether or not the plaintiff had acted in a matter befitting the invitation of the provisions of the Insolvency Act or whether what existed between the parties was a disputed debt to be proved by evidence in a civil suit. Put the other way, I must determine if the plaintiff has exhibited inability to pay due and ascertained debts or if the defendant is being abusive of the narrow but

fast motorway intended to consign and deliver an insolvent corporate out of business and into liquidation. I must determine this question because the answer I obtain will dictate whether I should forestall the statutory notice of keep off the plaintiff's destiny.

8. That there exists a debt between the parties is indubitable. What is in dispute, as I understand it, is the exact sum and when to pay and in what installments? I however do not understand how it is that the plaintiff admitted a specific sum on 31.8.2018, proposed payment by four specific installments, subsequently gave cheques not in line with the proposal, but the defendant then demanded a lower sum. To this court, that is a disputed situation that is not suited for insolvency proceedings. When it is not so suited, it cannot be said that the presentation of the notice is free and innocent of the accusation that insolvency law is being employed as a tool for debt collection. In addition there is a proposal to pay by installments of Kshs.500, 000 which the defendant flatly rejected. Can a person prepared to pay Kshs.500, 000 per month be deemed unable to pay and must be exterminated?

9. There is yet a third matter that may shed light on whether or not the Plaintiff has exhibited inability to pay its debts in terms of section 184, Insolvency Act. It relates to the dealing between the parties well after the written contract between then had come to an end. That the defendant was keen to supply the plaintiff outside the contract period, is to me an indication of the faith the defendant had on the plaintiff. For a business relationship such trust must have been planted and husbanded by healthy commercial and financial dealing which then would not infer inability to pay. Those three facts demonstrate and establish to me a prima facie case with probability of success.

10. Once there is demonstrated a prima facie case, one must appreciate the ripple effects of the presentation of a winding up cause on the company on its business and relations with business creditors and debtors alike. I find that it will result in erosion of all the business goodwill which may be irreparable. This court has always held the view that presentation of a winding up cause is ruinous and many times lethal to the corporate person. In **Joginder singh Dhanjal vs Dhanjal Brothers Ltd (2016) eKLR** the court said:-

> **"Noting that the Presentation of Winding up cause effectively paralyses the company, (see QUEENWAY TRUSTEES LTD. -VS- OFFICIAL RECEIVER AND LIQUIDATROS, TANNERIS OF KENYA LTD) it is not difficult to imagine the possible run in on the company by its creditors and the customers alike. It is not far-fetched that bank creditors would be entitled under charges to recall loans purely on the basis that a Winding up cause has been presented. In that event the effect on the company which would reflect on contributories, including the petitioners is not difficult to fathom. I am minded to say that a Winding up court is bound to strive to obviate such eventualities occurring to the detriment of all concerned. It can only do that by looking at what I would call the best interest of the company".**

11. It is now well settled that a disputed debt, unless the dispute be frivolous[1], makes a winding up remedy unavailable and that to invite insolvency court to undertake debt collection is improper[2] and may amount to abuse of the process of the company court.

12. While well aware that at this interlocutory state I must refrain from pronouncing myself determinatively, lest I embarrass the trial, if we ever reach there, I have made the following observations to show that I am convinced and persuaded that there has been demonstrated a prima facie case that needs investigation by way of evidence and that pending such investigations the company needs to be protected against the inevitable repercussions of a winding up cause being instituted

13. On that finding, I do grant a temporary injunction but well aware that there is a debt that though disputed on quantum needs to be ascertained, I impose conditions that:-

i. The plaintiff shall pay to the defendant a sum of Kshs 10,000,000 within 45 days from today.

ii. Parties shall within 14 days agree on a joint auditor to reconcile the books and determine the sum due between them.

14. Being cognizant of the narrow breadth of the dispute, I direct that the matter be mentioned before court on the 23.01.2020 to confirm compliance and for further directions.

Dated and **signed** this **29th** day of **November 2019**

P J O Otieno

Judge

Signed and **delivered** this **29th** day of **November 2019**

Dorah Chepkwony

Judge