



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 3 OF 2015
IN THE MATTER OF JOE'S FREIGHTERS LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CHAPTER 486 LAWS OF KENYA)
RULING

1. The Court is asked to bring these Winding Up Proceedings in respect to Joe's Freighters Limited (company) to an immediate end.
2. Apar Industries Limited (APAR) seek this early determination on the basis of a Notice of Motion dated 2nd August 2016 and a Notice of Preliminary Objection dated 14th September 2016. Both were heard together and as will become apparent are really two sides of the same coin.
3. The Notice of Motion seeks the following prayers:-
 1. THAT this Honorable Court be pleased to discharge and/or set aside the Orders issued on 5th November, 2015 for appointment of the Official Receiver as the Interim Liquidator.
 2. THAT the winding up Petition herein be struck out.
 3. THAT the cost of this Application be provided for.
4. The Notice of Preliminary Objection raises the following five (5) grounds:-
 1. THAT the Petition herein is offensive to the provisions of law particularly section 7 and 34(1) of the Civil Procedure Act. The Petition as currently instituted is outlawed by Statute hence a nullity *ab initio*.
 2. THAT the Petition is incurably defective as it is brought in the improper court and cannot stand in this Honorable Court.
 3. THAT the pendency of the suit is frivolous, scandalous and an abuse of the process of this Honorable Court.
 4. THAT the Petition is unprocedurally before this Court with conscious contravention of the law and should be dismissed *in limine*.

5. The Petition as currently presented is by way of an Amended Petition filed herein on 11th June 2015. The Petitioner is one Joseph Karuoro Claudio. The Amendment corrected the name of the Company from 'Rural Joe's Freighters Limited' to 'Joe's Freighters Limited'. Pursuant to leave granted on 22nd June 2015 by the Deputy Registrar of this Court, the Amended Winding up Cause was advertised in the Daily Nation Newspaper on 30th June 2015 and The Kenya Gazette issue of 10th July 2015 under Gazette Notice No. 5007.

6. In the Amended Petition it is explained that the Company was incorporated on 29th January 1991 under the provisions of Chapter 486 of The Laws of Kenya and has its registered office on LR No.9042/631 in Nairobi and Postal Address of Box 56553-0020 Nairobi. The objects for which the company was established included to carry on business of Clearing and Forwarding.

7. The Nominal capital of the Company is Kshs.100,000/= divided into 1000 shares of Kshs.100/=each. The amount of the capital paid up or credited is Kshs.100,000/=. The Petitioner is said to be the major Shareholder of the company.

8. The grounds put forward for seeking the Petition are set out in paragraph 6 of The Amended Petition as follows:-

“THAT the grounds upon which your Petitioner seeks the Orders hereinafter set out are that:-

a. The Company ceased trading in 2012.

b. The Company has neglected to call Annual General Meetings of the Company and has not filed Annual Returns since 2012.

c. The affairs of the Company have since 2009 been conducted by a manager, Albanus Wambua Nzomo who has been managing the Company's day to day affairs.

d. In August 2010 the said Albanus Wambua Nzomo as manager of the Company entered into various contracts with Apar Industries for customs passing, road transportation from Mombasa to Embakasi and delivery of cargo of aluminum conductors in twenty containers.

e. On 17th February 2012, the Company received at its registered office a statutory demand under section 220 of the Companies Act from Apar Industries Limited requiring the Company to pay the sum of Kshs.97,545,341.86/= within seven days from the date the notice was issued, such debt having arisen from services rendered.

f. On 8th August, 2014 judgement was entered in favour of Apar Industries in the total sum of Kshs.104,659,207.03/= together with costs and interest. The said judgement to this date remains unsatisfied.

g. The Company has been unable and/or defaulted to pay its three employees namely Flavian Ndung'u, Anthony Kamau and Kennedy Nderitu their monthly salaries from February 2011 to July 2012.

h. The Company is insolvent and unable to pay its debts.

9. That Amended Petition is verified by an Affidavit of the Petitioner sworn on 11th June 2015.

10. Emerging from the Affidavit of Nilesh Baria sworn on 2nd August 2016 in support of the striking out Motion and the Replying Affidavit would be the following undisputed facts. That prior to these Winding up proceedings, the Petitioner had commenced another Winding up Cause against the Company being Winding Up Petition No. 6 of 2012. Those proceedings were withdrawn by a consent dated 16th March 2015. Of worth noting is that the Petition was withdrawn after the original Petition herein was filed on

23rd February 2015. An issue taken up by APAR and which shall be discussed in this Decision.

11. It is also true that as things stand, Apar holds a Judgment for Kshs.158,344,575/= against the company in Civil suit No. 197 of 2012, (**APAR INDUSTRIES LIMITED VS JOE'S FREIGHTERS LIMITED**) (the civil suit). That Decree is yet to be satisfied.

12. It is also common ground that before its withdrawal, Winding up Cause No. 6 of 2012 had been stayed pending the hearing and determination of the Civil Suit. And the position of APAR is that this Petition is scheme by the Petitioner to assist the Company avoid satisfaction and execution of the Decree in the Civil Suit.

13. Apar seeks to defeat the Amended Petition on Grounds which are conveniently discussed under the following headings:-

a. The Petition is incurably defective because the verifying Affidavit to the Amended Petition is not dated as required by Section 25 of The Companies (winding up) Rules.

b. That this Winding up Cause is res judicata the Civil Suit.

c. This Winding up Cause is a collateral attack of the Execution proceedings in the Civil Suit and affronts the provisions of Section 34 of The Civil Act.

d. This Cause is a fraudulent abuse of the Court process as it is a scheme to avoid the satisfaction of the Decree in the Civil Suit.

14. The Petition was presented before the coming into force of the Insolvency Act and by dint of the Transitional provisions of that statute (Section 734 of The Insolvency Act), the applicable law to this matter would be the Companies Act (Cap 486).

15. Rule 25 of The Companies (winding up) Rules provides:-

“Every Petition shall be verified by an affidavit, which shall be sworn and filed by the Petitioner, or by one of the Petitioners if more than one, or where the Petition is presented by a corporation by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the Petition is presented, and such affidavit shall be prima facie evidence of the contents of the petition”.

The purposes of the Rule was explained by Mabeya J. IN THE MATTER OF BACTLAB LIMITED [2013]eKLR as follows:-

“The rule is clear. It requires that the Verifying Affidavit be sworn and filed within four days after the Petition has been filed. Form 11 of the forms in the schedule does specify what such an Affidavit should contain. The rule is in mandatory terms, failure to comply therewith, in my view, is fatal. The purpose of swearing and filing the Affidavit after the Petition has been filed is to ensure that the Petitioner has seen the contents of the Petition which he should then verify”.

16. The contention of APAR is that the Affidavit presented alongside the original Petition does not have the date when it was sworn and it was submitted that it rendered the entire Petition incurably defective. From the Court Record, it is clear that although undated, the Affidavit was filed alongside with the Petition. This would be contrary to the Rules as it ought to be filed within four (4) days after the Petition is presented. This Court however takes the same view as did Mabeya J. in **BACTLAB LIMITED** (*supra*) that when a defect of this nature does not lead to any prejudice to the parties to the Petition then it should not attract such a harsh sanction as a dismissal of the Petition. Instead the Petitioner is granted leave to file a Verifying Affidavit that complies with the Rules.

17. Section 7 of the Civil Procedure Act reads as follows:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

18. It is the contention of APAR that this Winding up Cause is res judicata the Civil Suit. That it seeks a re-adjudication of matters that were already determined by the Civil Suit. But I would have to agree with Counsel for the Petitioner that this argument is without merit as the two proceedings are separate and distinct. In the Civil Suit the Court was asked to adjudicate over a disputed debt and it found that the company was truly indebted to APAR for the sums sued therein. By virtue of the decree emanating therefrom Apar has a right to Execute for payment of the Decree in the event that the Company is unwilling to settle it.

19. The Winding Jurisdiction of the High Court is not to decide a disputed debt (disputed on substantial and not insubstantial grounds, see **Re African Safari Club Ltd** [2006] eKLR). Rather it is to determine a cause to wind up a Company on a ground specified in the Companies Act (now Insolvency Act). While an argument may still be available to APAR that the Winding up Cause is being abused to defeat the realization of the Decree in the Civil Suit, an argument that the two processes are one and the same is simply not tenable and does not stand.

20. There is a further argument that these proceedings are an affront to the provisions of Section 34 of The Civil Procedure Act which provides:-

1. All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
2. The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
3. Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

21. This Court accepts the proposition by Counsel for APAR that the following commentary quoted in the Uganda Case of **Mican Vs. Walakira** [1995-1998] 2EA 191(SCC) explains the scope, object and applicability of Section 34 of the Act.

“A lucid explanation of the scope, object and applicability of section 35 is given by the learned authors of All Indian Reporter Commentaries on the India Code of Civil Procedure at 583 of Volume 1(10 ed). Commenting on section 47 of the Code (which is identical to section 35 of our Civil Procedure Act), the learned author’s state:

‘This section ... has been enacted for the purpose of checking needless litigation and with a view to enable parties to obtain adjudication of questions relating to execution without unnecessary expenses or delay which a fresh trial may entail. The rule of res judicata deals with the finality of a decision of a Court on matters actually or constructively in issue before it and bars a fresh trial of any kind of such questions in subsequent proceedings between the parties, while (section 47) deals with the enforcement of such decisions and anacts that the questions specified in the section shall be tried in execution and not by a separate suit. In other words, where there is an executable judgement no suit lies for the enforcement thereof, or for determination of the questions specified in the section. The object of the section being to save unnecessary expense and delay and to afford relief to parties finally, cheaply and speedily without the necessity of a fresh suit, it must be

construed as liberally as the language would reasonably admit thereof. It embraces all matters connected with the execution of an existing decree, between the parties or their representatives, and covers all questions relating to the execution, discharge or satisfaction of the decree. It does not matter whether such questions arise before or after the decree has been executed and the fact that an alternative remedy by suit is provided in certain circumstances or that the application was made under another provisions of the Code, does not prevent the section from being applied for the decision of the questions falling within its scope”.

22. While one of the reasons why the Petitioner seeks the Winding up of the Company is its alleged inability to satisfy the Decree in the Civil Suit, this does not turn the cause into an adjudication relating to the execution, discharge or satisfaction of the Decree as envisaged in Section 34. One of the circumstance in which a Company may be wound up by the Court is if the Company is unable to pay its debts. Just because the debt is a Court Decree does characterize it as question relating to execution, discharge or satisfaction of a Decree under the provisions of Section 34.

23. Even then APAR is not foreclosed from taking up the argument that the Petition is simply a machination by the Company to avoid a debt and is therefore an abuse of Court. It is to this assertion that I turn my attention.

24. APAR contends that the basis of the Judgement against the Company in the Civil Suit is its breach of contract, breach of trust, fraud and making of false and irregular entries to the Kenya Revenue Authority, making false Documents, failing to remit to the authority all moneys received from APAR on account of Customs, IDF and VAT, retaining money otherwise meant for taxes and thereby unjustly enriching itself.

25. APAR also contends that the Petitioner and his wife Joyce Muthoni Claudio are the only Directors of the Company and the two have doggedly attempted to defeat APAR’s claim. It is alleged that during the pendency of the Civil Suit the Petitioner filed Winding Up Cause No.6 of 2012 which was only stayed upon intervention of Apar.

26. That the Company sought Stay of Execution of the Decree and on 9th February 2015, the Court granted the Stay but on condition that the Applicant deposits the entire decretal sum in an account jointly held by Counsel for the parties within 45 days of the Ruling and that the Petition which was presented on 23rd February 2015 was merely intended to avoid the ramifications of the Ruling.

27. As a further mark of bad faith on the Petitioner, it is said that he sought to withdraw Winding Up Cause no. 6 of 2012 through a letter dated 10th March 2015 knowing full well that it had filed this Petition on 23rd February 2015.

28. The Petitioner on the other hand maintains his bonafides and insists that the Company is unable to pay its debt. That Winding Up Cause No. 6 of 2012 was filed on 6th March 2012 whereas the Civil Suit was filed on 30th March 2012 and APAR’s allegations of fraud cannot hold.

29. The Power of the Court to strike out a Winding up Petition should only be exercised if on the evidence before Court it is a plain and obvious case for striking out and that the Petition is bound to fail (**Jitenda Brahmhatt Vs. Dynamics Engineering Ltd**[1986] eKLR). Is this Petition on the basis of the evidence before Court, so far, a plain and obvious case for striking out?

30. Winding Up Cause No. 6 of 2012 in respect of the Company was presented to Court on 8th March 2012. The Company sought a voluntary winding up of itself on the basis that,

“Pursuant to a special meeting of the Board held on 23rd February, 2012, it was resolved that the company be voluntarily wound up by the Court, with effect from 23rd February 2012 on the grounds that the members as currently constituted did not wish to continue with the business carried out by the company as set out in its objects”

The Affidavit that verified the Petition was executed by Joseph Karuoro Claudio of Post Office Box 56553-00200 Nairobi, the Petitioner herein, who described himself then as the Managing Director of the Company.

31. It now turns out, on the express admission by the Petitioner, that a few days before Winding Up cause No.6 of 2012 was presented, the Company had received a demand for payment of Kshs.97,545,341.86 within seven days of 17th February 2012 from APAR. Neither that Petition nor the meeting of the Board of the Company in which it was resolved to voluntarily wind up the Company makes mention of this Demand by APAR.

32. APAR filed suit on 30th March 2012 and has since obtained Judgement against the Company.

33. It would seem that, from the manner and timing in which the Company winding up cause No. 6 of 2012 was commenced, it was a bid to defeat the demand that had been made by APAR a few dates earlier. But undeterred APAR filed a Civil Suit to recover the debt and the suit proceeded inspite of the Winding up Cause, thanks to a Stay Order obtained by APAR.

34. That Cause has since been withdrawn but APAR thinks that the timing of the withdrawal is curious. The Cause was withdrawn through a Letter of Consent by the Advocates for the Petitioner and APAR dated 16th March 2015. This would be about three weeks after this Petition had been presented. I would have to agree that the timing of the withdrawal of Petition No. 6 of 2012, the presentation of the present application and the grounds put forward for the Petition may speak to some lack of probity of the Petitioner before Court. While the Petitioner seeks that the Company be wound up under the provisions of Section 219(e) of The Companies Act, that is because, '*the Company is unable to pay its debts*', the Petitioner cites other grounds that are not at ease with the evidence available.

35. The Petitioner says that the company ceased trading in 2012 and has neglected to call Annual General Meetings and has not filed Annual Returns since 2012. The evidence by the Petitioner himself is that he is the major shareholder of the Company and at least by 6th March 2012 was the Managing Director of the Company. There is no evidence that this status has changed. There is evidence that on 23rd February 2012 the Board of Directors of the Company held a meeting in which a resolution to wind up the Company was passed. In that meeting the Directors present were Joseph Karuoro Claudio (the petitioner) and Joyce Muthoni Claudio. APAR has alleged that the two are still Directors of the Company and that Joyce Muthoni Claudio is the wife of the Petitioner. Those allegations are not denied by the Petitioner.

36. In these circumstances how can the Petitioner complain and seek to wind up the Company on the ground that the Company has neglected to call Annual General Meetings of the Company and has not filed Annual Returns since 2012?

37. That may demonstrate that the Petition has not been presented, entirely, in good faith. Yet because the Petitioner also cites the Company's inability to pay debts, that if proved, would be sufficient ground for petitioning. If indeed and truly the Company is unable to pay its debts then the Petition cannot amount to an abuse of Court process simply because the Petitioner had other ulterior motives in presenting it. In this regard what Buckley LJ said in **BRYANSTON FINANCE LTD VS. DE VRIES (No. 2)[1976] IALL ER 25** (quoted in **JITENDRA BYAMBHATT** (supra) is not without useful learning:-

'The learned Judge, rightly in my opinion, thought that a petition could not be an abuse simply because the petitioner was actuated by malice. If a petitioner has sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person or persons cannot, it seems to me, render that ground less sufficient. If, on the other hand, he has no sufficient ground, his petition will be an abuse, whether he be actuated by malice or not. I personally feel no doubt that Mr de Vries(whether rightly or wrongly) is genuinely of the opinion that Mr Smith is conducting the affairs of the plaintiff company and of the group for his own personal advantage and in a manner oppressive to the shareholder. If Mr de Vries were able to make this good, he would be very likely to succeed in obtaining a winding up order. The fact that

his belief was coupled with, or even fed or generated by, personal animosity against Mr Smith would not, I think, disentitle him to such an order’.

38. The Court takes a view that the question whether the Company is unable to pay its debts is not frivolous and requires a fully fledged interrogation. It is not in dispute that prior to the Company commencing winding up cause No. 6 of 2012 Apar, through its Lawyer, had issued a Demand Notice to the Company requiring it to pay Kshs.97,545,341.86. The Company failed to do so and Apar commenced the Civil Suit. Apar succeeded in its claim and has a Decree in its favour. The Decree is yet to be satisfied. It is the case of Apar that the Directors of the company have committed offences antecedent to bringing of the petition as follows:-

- a. They knowingly concealed, destroyed and/or falsified accounts and affairs of the company prior to presenting the petition.
- b. The Directors fraudulently transferred and/or disposed property belonging to the company to other entitles and for personal gain.
- c. The directors who moved the petition has removed property outside the jurisdiction of the creditor in bid to obstruct execution of the decree by the creditor.

39. In essence APAR asserts that the Company is in a position to pay but is deliberately and fraudulently avoiding the debt. What the APAR has not done, however, is to present, at least upto now, any evidence of the specific allegations it has made against the Directors. Whilst it may sometimes be difficult to obtain and summon evidence of systematic concealment, fraudulent dissipation or dispersal of assets, he who asserts such wrongdoing should place some evidence that these has happened before invoking the provisions of Section 112 of the Evidence Act which provides:-

‘In civil proceedings, when any act is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him’

In the absence of any evidence that would shift the burden to the Company to make an explanation, the Court is slow not to strike out the Petition at this interlocutory stage.

40. For this singular reason this Court does hereby dismiss both the Notice of Motion dated 2nd August 2016 and the Preliminary Objection of 14th September 2016. Costs to the Petitioner.

Dated, Signed and Delivered in Court at Nairobi this 27th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Kibera for Respondent

Mugisha for Applicant

Alex - Court Clerk