REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 2 OF 2016

IN THE MATTER OF: PRIDEINN HOTELS & INVESTMENTS LTD

VERSUS

IN THE MATTER OF: THE COMPANIES ACT, CAP 486 (REPEALED) AS

READ WITH SECTION 734 (1) (g), INSOLVENCY ACT, 2015

R U L I N G

1. Before court for determination is the Petitioners Petition to wind up company. The petition is grounded on the facts that the company is indebted to the petitioner in the sum of Kshs.69,353,908.20 on account of a debt duly incurred and acknowledged in a series of documents commencing with a lease dated 13/9/2011, Deed of Variation dated 2/11/2011, Agreement to renovate, Surrender of Lease dated 16/3/2012 and resting with a document headed "payment proposal and undertaking" dated 4/4/2012.

2. According to the payment proposal and undertaking the parties agreed and the company acknowledge a debt as follows:-

Costs

- **50% of renovation: Kshs.25,000,000/-**
- **Refund of stamp duty: Kshs. 765,000/-**
- **Consideration for surrender of lease: USD 69,600/-**
- **Legal fees paid: Kshs. 120,000/-**

3. In the petition, the petition concedes and confirms that the sums of USD 69,600, Kshs.765,000 and Kshs.120,000 were all paid in full and two (2) instalments of Kshs.730,000/= made in May and June 2012 were equally paid towards settlement of the 50% renovation costs.

4. From the petition it is the subsequent instalments beginning with that for Kshs.730,000 due in July 2012, that were never paid and therefore the petitioner contends that when contractual interest rate is applied there exists an acknowledged debt of Kshs.69,353,908.20 as at 31/5/2016 for which it did serve a Notice of demand for payment.

5. The petition was supported by the statement of SALIM SULTAN MOLOO essentially reiterating the averment in the petition and a verifying affidavit of the same person which then exhibited the document founding the debt.

6. The petition was opposed by the company which filed an 'Affidavit in Reply To The Petition' sworn by one SHABIR MOHAMMED KASSAM. In the Reply, the deponent does not deny the existence of lease, the variation

of the lessee, Surrender of the Lease, proposal to pay and undertaking as well as the notice of demand. What the deponent however disputes is the sum alleged to be due and owing. In fact the Respondent avers that the "payment proposal and undertaking" was an agreement between the parties and made collateral to the surrender of lease and in it the parties agreed on the mode and timelines for the payment of the sum agreed in the surrender of lease. The sums agreed as due and payable and the payment made pursued thereto are common ground to both parties and the only point of departure is, according to the company, that it 'strongly deny that it is currently indebted to the petitioner in the sum claimed' and that there was, beyond the written agreements, a verbal contract that the petitioner would avail to the company a certificate of completion which has not been done and that it was coerced into the agreement.

7. Infact the company at paragraph 12 & 13 of the response admit having stopped payment due to failure by the petitioner to provide the documents.

8. This being a winding up cause, the law now calls it liquidation proceedings, whether or not the court proceeds to give a liquidation order is governed by the provisions of sections 424(1)e and 247 of the Insolvency Act. Section 424 provides:-

1. A company may be liquidated by the Court if:-

a) The company has by special resolution resolved that the company be liquidated by the Court;

b) Being a public company that was registered as such on its original incorporation-

i) The company has not been issued with a trading certificate under the Companies Act, 2015; and

ii) More than twelve months has elapsed since it was so registered;

c) The company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;

d) Except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;

e) <u>The company is unable to pay its debts</u>;

f) At the time at which a moratorium for the company ends under section 645- a voluntary arrangement made under Part IX does not have effect in relation to the company; or

g) The Court is of the opinion that it is just and equitable that the company should be liquidated.

2. A company may also be liquidated by the Court on an application made by the Attorney General under section 425(6).

9. In this matter the sole reason the petitioner seeks the orders against the company is that the company has been unable to pay the debt owed. Failure to pay is not contested but the company says that the petitioner is yet to avail completion Certificate and that it was coerced into signing the agreement.

10. To this court the issue for determination is whether there is a debt due and payable and whether the company has a genuine dispute as the basis for failure to pay.

11. On the existence of the debt, there is an admission that the trail of agreement were indeed executed by the company. However the company now says that the payment of 50% of the renovation costs of which it paid two instalments totaling Ksh.1,460,000.00 was made conditional to production of approvals and certificate of completion pursuant to a subsequent verbal agreement.

12. My understanding of the law of contract is that parole evidence, generally, cannot be invited to disprove terms a written contract. In

Kenya Commercial Finance Company Ltd vs Kipngeno Arap Ngeny & Another [2002] eKLR the court reinstated the position of law in this regard and said:

"The Company cannot now come to court and state orally that the interest rate was at 8-12% when there is no documentary evidence to support that assertion.

The Company had exchanged a lot of correspondence with the bank in particular it's letter of 13th July 1998. It sought waiver of penal interest. If the interest had been agreed at 8-12%per annum, what would have been simpler than the matter be raised at that time?"

13. In the current matter, prior to the affidavit of SHABIR MOHAMMED KASSAM, nothing has been laid before the court to support the assertion that the parties agreed that the petitioner would not only provide approvals for renovation but also a certificate of completion as a condition for the payment of the agreed sum of Kshs.25,000,000/=. I consider this reason advanced by the company to justify its failure to pay as agreed, not to be genuine nor is it a substantial ground to just stop payment mutually agreed to be made. It would however be a considerable ground and one worth enforcing if it were to be in writing either as a condition and term of the contract itself or if put in some other document as an addendum or supplement to the agreed sued upon. I hold that the alleged oral agreement cannot be called in to subtract or diminish the rights and obligation the parties exercising their undoubted right to contract agreed to and captured by the company itself in the proposal and undertaking to pay. I do find that the sum is due and payable and that the company has no genuine basis not to pay as agreed.

14.The second ground for the company in resisting payment is that it was coerced to sign documents with unfavorable terms. The reason is evidently put as extremely general as it could. It was not specific on which of the five documents it was coerced to execute. However even coercion must be put in context of the circumstances that naturally flow from the documently alleged to have been procured by coercion.

15. The proposal to pay and undertaking was made on 4/4/2012 and payment then followed with postdated cheque which were indeed paid much later without the company seeking to recall or countermand the said cheques. The company also took no steps to set aside the document (s) alleged to have been coercively obtained from it by any correspondence, complaint to the police or indeed a suit. Infact from the year 2012 when the proposal to pay and undertaking was made and part payment effected, to November 2016 when this cause was lodged, no resistance nor challenge, exhibited to court, was ever preferred against any of the documents founding the debt. The question that lingers in my mind is when did the company discover having been coerced into executing the unidentified document? That ought to have been answered the company but no efforts have so far been made towards meeting that duty. This far I hold that the allegation of coercion was a wild card thrown at the court and not a genuine nor honest resistance to the payment debt. I find this reason as well to be insufficient justification for failure to pay the contracted debt. There is no genuine dispute disclosed by the company in these proceedings.

16. During the hearing, both counsel addressed the court and cited to it various decisions, foreign and domestic, on when to and when not to make a winding up order against the company. The decision of the supreme court of India in ***Tata Iron and Steel Company vs Micro Forge [http://indiankanoon.org*** and the English, chancery division decision in ***Re. Lympne Investments Ltd [1972]2 ALL ER*** were cited for the proposition that winding up proceedings should not be used as a means to collect a disputed debt that ought to be collected by ordinary civil litigation and that to do so is an abuse of court process. The two decisions also held that where there is a *bonafide* dispute based on solid ground then no winding up order should be made and the dispute is better for resolution by the civil court.

17. In this matter however, I have found no *bonafide* dispute exist as the reasons advance by the company are not, to his court, genuine or honest. They can thus not be termed *bonafide*. Therefore no challenge has been made to the foundation of the claim so as to present a *bonafide* dispute.

18. In ***Re: Standard Ltd, Ex-parte Tricon Paper International Bu*** ***[2002] 2 KLR*** Ringera J said:

"……it is clear that if a petition is intended to enforce payment of a disputed debt, it will be treated as an abuse of the court process and will be struck out. However <u>the dispute must be predicated on substantial grounds and not constituted by the mere fact of an affirmation by the creditor one on hand and denied by the debtor on the other hand</u>"

19. Having found that the debt here is not genuinely disputed, the next question is whether the petitioner was entitled to present the petition in the manner he did. The question of the competence of the petition was raised earlier and dealt with and resolved by the courts ruling dated 9/6/2017. It is today not available to be reconsidered afresh. In any event, I have seen a Notice of Appeal filed by the company and seeking to challenge that earlier decision. Let it rest away from this court.

20. Having said that the debt was duly acknowledged in writing and has been substantially paid, I think I have no otherwise but to find that the petition is merited.

21. Being so merited, and pursuant to the discretion granted by the provisions of sections 427 Insolvency Act, I make the following orders:-

i) The Company, Prideinn Hotels & Investments Ltd has shown inability to pay the debt owed to the Petitioner in the sum given Kshs.69,353,908.00 as at 31/5/2016 and is for that reason placed into liquidation until such debt shall have been paid or otherwise discharged.

ii) I appoint the Official Receiver as the interim liquidator of the company.

iii) For purposes of this Order the appointment takes effect forthwith but the official receiver must take charge and running of the affairs of the company not later than the 01.10.2017.

22. I award costs of the petition to the petitioner.

Dated and delivered at Mombasa this 22nd day of September 2017.

P.J.O. OTIENO

JUDGE