REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI COMMERCIAL COURT

WINDING-UP CAUSE NO. 14 OF 2015

IN THE MATTER OF SPENCON KENYA LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486) LAWS OF KENYA

RULING

1. The Petitioner filed a Winding Up Petition against the Company Spencon Kenya Limited (herein after the Company) dated 31st March, 2015 and filed on 1st April, 2015. By a Notice of Motion dated 28th March, 2015, the Company seeks the striking out of the Petition on the grounds that the Petitioner did not comply with the mandatory provisions of Rule 23 of the Companies (Winding Up) Rules.
2. That likewise, the winding up proceedings are based on a debt that is seriously disputed. The Application is supported by the affidavit of KunyangaNkatha Hilda, the legal counsel of the company, sworn on 29th April, 2015.
3. It was contended that the Petition herein was presented to this honourable court on 1st April, 2015, was served upon the Applicant Company on the afternoon of 9th April 2015. According to the deponent, the Petitioner proceeded to advertise the said Petition on 10th April, 2015 in the Daily newspaper at page 42 in blatant breach of Rule 23 of the Companies (Winding Up) Rules.
4. The deponent further deposed that the Petitioner published a further advisement on 24th April, 2015 in the Daily Newspaper at Page 58, in disregard of the aforesaid rule. It was also the company's contention that the alleged debt upon which the Petitioner's winding up petition is based, is disputed and cannot in law form the basis of a winding up petition.
5. According to the deposition of Nkatha Hilda, the alleged debt is in respect to legal fees, where the Petitioner rendered legal services to the Company in respect to arbitration fees. The Arbitration fees concerned the Company's contractual claim for works on the Mombasa Sewage Treatment Plant (Contract No. WS/80/01-IVA- Civil Works and Contract No. WS/80/01-V-Electrical and Mechanical Works, from which an arbitral award was issued in favour of the company.
6. The Company further disputes the deed of settlement signed in the year 2014, where it agreed to pay the Petitioner Kshs. 64,960,000/= for legal services provided. It was however contended that the said document was signed by unauthorized persons who had no authority to act on behalf of the company. That further, the said document was signed without the approval of the company's board of directors as provided for in its memorandum and articles of association.
7. The Company averred that even though the Petitioner was demanding high and unjustified amounts as legal fees, it was willing to resolve the dispute to the extent that is reasonable and justifiable. That this is evidenced by the negotiations being carried out by the parties as evidenced by various communications between the parties.

8. The deponent also pointed out that in the absence of a resolution between the Petitioner and the Applicant Company on the issue of fees, the Petitioner had a legal duty to tax its bills against the Applicant Company, which the Petitioner has not done.
9. That since taxation has not taken place and there is no certificate of costs issued against the Applicant Company in respect of the alleged legal fees, the debt herein has not been proved and the same can therefore not form the basis of a winding up Petition. In view of the foregoing, it is the Applicant's assertion that the winding up proceedings are an abuse of the court process and the same ought to be dismissed.
10. In reply to the application, the Respondent filed the affidavit of George MuruguMuthui, advocate, sworn on 13th May, 2015. The petitioner argued that the advertisements that ran in the daily nation with regard to the Petition for winding up, did not compromise the Petition. According to the Petitioner, the advertisement of 24th April, 2015 was in accordance with Rule 23 of the Companies (Winding Up) Rules.
11. That in any case, the said advertisements were not prejudicial or detrimental to the Company. It was also stated that the debt arose from a legal fees settlement agreement dated 11th April, 2014 which was duly signed, sealed by the company and registered. That in view of this, the agreement is actionable in law without taxation as per section 45 of the Advocates Act.
12. It was also the deponent's claim that if the Company sought to have the settlement set aside, then it should have applied through section 45(2) of the Advocates Act and not through an application to strike out the petition. In the assessment of the Petitioner the Deed of settlement dated 11th April, 2014 was valid and enforceable since the same was signed by a director and secretary of the company at the material time.
13. The Petitioner was forthright that it had conducted several searches at the company registry, which searches, inter alia confirmed the directors and secretary of the company. That in the foregoing, the Petitioner was not privy to nor had any knowledge of the internal wrangles within the company.
14. The Petitioner also claimed that the company remitted a withholding tax of Kshs. 750,000/= to Kenya revenue authority (KRA), on behalf of the petitioner on account of the legal services. That the remittance of 750,000/= as withholding tax to KRA was an admission to the debt owed. It was additionally contended that the Company admitted in its affidavit in support of the application to being indebted to the Petitioners.
15. In conclusion, the Petitioners averred that the application before the court was misplaced and was intended to cause delay in the cause of justice. That in any case, the applicant will have its day in court and a fair opportunity to advance any arguments against the winding petition at the hearing.
16. The Motion herein was to be determined by way of written submissions. The Company filed its submissions and supplementary submissions on 1st July, 2015 and 6th August 2015 respectively, while the Petitioners filed their submissions on 23rd July, 2015. The same were orally highlighted in court by learned counsel to the respective parties on 19th February, 2016.
17. I have considered the pleadings, depositions and rival submissions including the various cases cited.The issue for the court's determination is whether the company herein has raised sufficient grounds to warrant the striking out of the Petition for winding up the company.
18. In the case of **Brahmbhatt vs. Dynamics Engineering Ltd(1986) KLR 133** the court 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.'***

19. Are the reasons for striking out the winding up petition in this case plain and obvious? Looking at the Petition in this case, the company posits that the Petitioner failed to comply with the mandatory terms of Rule 23 of the Companies (Winding Up) Rules with regard to advertisement of the winding petition; and that further, the Petition is based on a winding up Petition. I propose to start with the first issue.

i. ***The Petitioner did not comply with the Mandatory Provisions of Rule 23 of the Companies (Winding Up) Rules***

20. Rule 23 of the Companies (Winding Up) Rules reads as follows;

"Except where the court gives leave to advertise before service, every petition shall be advertised not less than seven days after service on the company and at least seven days before the hearing as follows-

a. ***once in the Gazette, and once at least in one newspaper circulating in the district where the registered office, or principal or last known principal place of business, as the case may be, of the company is or was situate, and in such other or additional newspaper as is directed by the court; and***
b. ***such advertisement shall state the date on which the petition was presented and the name and address of the petitioner and of his advocate, and shall contain a note at the foot thereof stating that any person who intends to appear on the hearing of the petition, either to oppose or support it, must send notice of his intention to the petitioner, or to his advocate, within the time and manner prescribed by rule 29, and an advertisement of a petition for the winding up of a company by the court which does not contain such a note shall be deemed to be invalid:***

> ***Provided that, if the petitioner, or his advocate, does not within the time prescribed by these Rules, or within such extended time as the registrar may allow, duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard shall be cancelled by the registrar and the file shall be closed unless a judge or the registrar shall otherwise direct". (Emphasis mine***)

21. A reading of the above clause reveals that the Petitioner must meet certain conditions in terms of an advertisement under the said Rule. It is mandatory that the Petition should not be advertised less than seven (7) days after service or seven (7) days before date of hearing, that the location, or last known address of the company should be included in the advertisement together with the name of the Petitioner and his advocate. Rule 23 (b) states that the advertisement shall be cancelled if it does not abide by the Rule as set therein. See the case of **Re Mode 1996 Security (2005) I KLR 583**where it was held that the petitioner's non-compliance with the applicable and mandatory provisions of rule 25 of the Companies (Winding Up) Rules was fatal to the Petition and the same was struck out.
22. In this case, it is not in dispute that the winding up petition was advertised exactly one day after presentation. The Petition was not advertised in a manner prescribed by Rule 23. Does this then warrant the striking out of the Petition as argued by the counsel to the Applicant? I have examined, the said Rule 23 of the Companies (Winding Up) Rules and the case of **Re Mode 1996 Security** (supra) as cited by the Petitioner/Respondent. I find that indeed Rule 23 is coached in mandatory terms.
23. However, I would have to agree with the Respondent/Petitioner's argument that the said rule gives a judge or registrar discretion on whether or not to strike out a petition which has not been duly advertised in a manner prescribed by Rule 23.
24. I draw my thinking from the clause which states ***".....Provided that, if the petitioner, or his advocate, does not within the time prescribed by these Rules, or within such extended time as the registrar may allow, duly advertise the petition in the manner prescribed by this rule, the appointment of the time and place at which the petition is to be heard shall be cancelled by the registrar and the file shall be closedunless a judge or the registrar shall otherwise direct".*** My reasoning is also bolstered by the court of appeal case of **JitendraBrahambhatt –v- Dynamics Engineering Ltd (1986) eKLR**where **Nyarangi JA** stated that the failure to comply with rule 23 is not fatal to the Petition**.**
25. Further to this, I note the Company's argument that the Respondent's action of advertising the said Petition without due regard to Rule 23 has occasioned it irredeemable prejudice and affected its goodwill and reputation.
26. I find that this is just a bear statement and nothing has been presented to this court to actually prove such prejudice or injustice. In view of the foregoing, I will decline to strike out the petition on the ground that the subject petition was not advertised in the manner prescribed by Rule 23. I shall now look at the second issue.

ii. ***Whether there the Petition is based on disputed debt***

27. This was a hotly contested issue. According to the submissions of the Company/ Applicant, the Respondent failed to appreciate that there is a genuine and bona fide issue in respect to the alleged debt. The alleged debt herein is a sum of Kshs. 64,960,000/=. The dispute between the parties is based on outstanding legal fees from legal services provided by the Petitioner's law firm.
28. I have noted the Applicant has not disputed that the Petitioner provided legal services to the Applicant which services the Applicant has not paid for. The company however asserts that the amount in question is exorbitant and the settlement agreement dated 11th April 2014 is unenforceable since it was signed on behalf of the company by unauthorized persons.
29. The question that this court has to determine is whether these reasons paint a picture of a disputed debt. In the case of **Re Standard Ltd Ex parte Tricom Paper International BV (2002) 2 KLR 643**, the court held that, the disputed debt must be predicated on substantial grounds and not by the mere fact of an affirmation by the creditor and a denial by the debtor. What then constitutes substantial grounds? In the case of **Re the Matter of African Safari club Limited (2006) eKLRMaraga J** stated as follows**;**

> ***"What is a substantial ground, in my view, differs from one case to another. In Re Welsh Brick Industries, Limited [1946] ALL E.R. 197 it was held that there being a fair probability that the company has a bona fide defence which would entitle it to an unconditional leave to defend a claim in the ordinary court is not enough. There must be some substantial ground for defending the action. For instance where there is a question as to whether there is in fact a debt or not that is of course a substantial ground warranting the striking out of the petition as an abuse of the process of the court. See New Travellers Chambers Ltd – Vs – Cleese and Green (1874) 70 LT271.***

If, however, the dispute is based on frivolous grounds the petition will be allowed to go on. In Re London and Paris Banking Corporation, Equity cases 444 Sir G. Jessel MR stated that "It is not sufficient for a company to say "we dispute the debt'; they must show some reasonable ground for doing so." " (emphasis added)

30. Further to the above, it is now settled law that winding up proceedings are not for the purpose of deciding a disputed debt.In**Re Bentley Travel Ltd NRB W-up No. 5 of 1999(UR)**the court held that the fact that a company owes another company or an individual money does not in itself lead to winding up proceedings as the Companies Act was not designed to blackmail companies through the threat of winding up proceedings every time a company disagrees with a would be creditor or every time a company denies indebtedness.
31. Winding up Petitions are only ideal where there is clear evidence that a company is unable to pay its debts and the onus is on the Petitioner to show that the debt is due and the company is unable to settle the debt that has become due. Also see the case of **In the Matter of PJ Dave Flowers Limited (2011) eKLR.**
32. Moreover in **Re Lympne Investments Ltd (1972) 2 All ER 385**, the court held at page 388 that :-

> ***"The companies' court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought."***
>
> ***(Emphasis added)***

33. Finally, in **Re Mann –vs- Goldstein (1968) 2 ALL ER 769 at page 773**, the Court held:-

> ***" ……(iii) Where the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the***

court should, therefore ignore) and the company is solvent the court will restrain the prosecution of the Petition to wind up the company. As Sir Richard Melins V.C said in Cadiz Waterworks Co. –v-s Barnett, of a winding up application,

'It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and a disputed debt." (Emphasis mine)

34. The common thread that runs through these cases is that where there is a genuine disputed debt on substantial grounds a Petition will be struck out. Such a dispute must be based on sound grounds. The dispute should also not be raised in order to defeat the winding up proceedings. It is also clear that where there is solvency and a genuine disputed debt, a Petition for winding up will not stand.
35. In the case before me, it is not disputed that there was a client advocate relationship between the Company and the Petitioner. The crux of the Company's argument against the winding up Petition is that the fees charged in connection the legal services rendered are exorbitant. Further to this, the Company asserts that the settlement agreement dated 11th April, 2014 signed between the Petitioner and the Company that contained the terms to settle the debt is unenforceable since the same is tainted with illegality.
36. The company contended that the same was not signed under the company seal, nor was it executed by authorized persons. It was also argued that there was no board resolution authorizing the company enter into the agreement. The Petitioner however dismisses this assertions and contended that these cannot form the basis of striking out the Petition. That the Company can ventilate these issues during the hearing of the winding up petition.
37. Having considered the rival arguments, I beg to differ with the Petitioner. Winding up a company is a serious affair and should only be done when it can be proved that a company is unable to pay its debts. The Company's case is that it is not insolvent as alleged by the Petitioner. That it has enough funds to settle the Petitioner's claim if the same is proved genuine.
38. I find that the issues raised by the company with regard to the validity of the Settlement Agreement as well the amounts charged by the Petitioner as legal fees are not issues that can be resolved on affidavit evidence. I am satisfied that these are seriously disputed issues that call for a full-fledged hearing. They are not matters for the Company court as it is not a forum for deciding disputed debts.
39. In any case I find that the Company has demonstrated that the Petitioner has alternative remedies to a Petition for winding up. It can seek to enforce the settlement agreement dated 11th April, 2014 through the courts or even opt for taxation of its bill of costs under the suit instituted to enforce the arbitral award rendered in favour of the company.
40. For these reasons I find that the Notice of Motion dated 28th April, 2014 is merited. The Petition herein dated 3st March, 2015 and presented to this court on 1st April 2015 is hereby struck out on grounds that it is an abuse of the process of court, however I order parties to bear their costs.
41. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

C. KARIUKI

JUDGE