



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISIONS**  
**WINDING-UP CAUSE NO. 32 OF 2015**

**IN THE MATTER OF TURBO HIGHWAY ELDORET 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 Turbo Highway Limited (herein after the Company) dated 8<sup>th</sup> July, 2015 and filed on the same date. By a Notice of Motion dated 28<sup>th</sup> July, 2015, the Company seeks the striking out of the Petition and an injunction to restrain the Petitioner, its servants, agents or other person acting on its instructions, from gazetted in the Kenya Gazette and/or advertising in the media outlet and/or newspaper and/or in any other way issuing a notice of the filing of the Petition for winding up herein. The Company also prays for the costs of the application to be provided for. The application was based on the grounds outlined therein and supported by the affidavit of Amit Aggarwal sworn on 28<sup>th</sup> July, 2015.
2. It was deposed that the company purchased goods worth Kshs. 10,865,826.98/= from the Petitioner and paid the sum of Kshs. 7,435,839.64/= leaving a balance of Kshs. 3,419,987.34/=. In the year 2014, the company ordered more goods from the Petitioner worth Kshs. 6,574,449.76 and allegedly paid the Petitioner Kshs. 7,656,127.10/=.
3. A balance of Kshs. 2,338,309.32/= remained outstanding prompting the Petitioner to write a letter dated 23/3/15 demanding for the payment of the same. That the Company thereafter offered to settle the outstanding amounts in 15 equal instalments of Kshs. 150,000/= a proposal that was rejected by the Petitioner. It was the Company's position that delay for the payment of the outstanding balance was occasioned by factors beyond its control.
4. That beyond this, the Company has been paying the outstanding debt since on 21 July, 2015 it deposited Kshs. 400,000/= in the Petitioner's account number 00100010571203 domiciled in I&M Bank. In addition to this, the Company contended that it drew 12 cheques for the sum of Kshs. 150,000/= and a further cheque for the sum of Kshs. 138,309.32/= in favour of Safepak Limited towards defraying the outstanding debt.
5. That in view of the foregoing it is clear that the company is solvent and able to pay its debt. The Company further argued that the Petition herein was brought with malicious intent and seeks to cause injury and damage to the company. In sum, the Company urged the court to grant the orders sought in the application.
6. In reply to the application, the Petitioner/Respondent filed the affidavit of Catherine Wangari, sworn on 21<sup>st</sup> August, 2015. The Petitioner argued that the subject of the Petition has been

- admitted since the Company conceded that it owed Safepak Limited a sum of Kshs. 2,338,309.32/=. The deponent conceded that after the filing of the Petition, the Company partly settled the outstanding debt when it paid a sum of Kshs. 400,000/= and issued postdated cheques totaling to Kshs. 1,938,309/=.
7. However, it was contended that the Petitioner is under no obligation to accept part payment or payment by installments of the debt but is entitled to the recovery of the full amount. That further to this, the payments made in settlement of the debt were only made after the lodging of the Petition. In addition, the Petitioner was of the opinion that the reasons advanced by the Company on its inability to pay the outstanding amounts did not constitute a dispute as to the debt that is due and owing.
  8. That in any case, the Petition herein was filed due to the Company's inability to pay its debt, a fact that has been admitted in the pleadings and affidavits filed by the company. The company further denied any ill motive or ill will against the company and insisted that it was only pursuing its legitimate right as provided for in the law. In this regard the, Petitioner pleaded that Petition was not an abuse of the court process and same should therefore proceed for full hearing where the applicant can advance its arguments against it. The Petitioner in sum urged the court to dismiss the application with costs.
  9. The application was dispensed by way of written submissions. The Company filed its submissions on 19<sup>th</sup> October, 2015, while the Petitioner filed its submissions on 28<sup>th</sup> October, 2015. I have considered the pleadings, depositions and rival submissions including the various cases cited.
  10. The issue for the court's determination is whether the company herein has raised sufficient grounds to warrant an injunction sought and the striking out of the Petition for winding up the company. I will first deal with the issue of striking out the Petition.
  11. 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.'***

12. 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 through its written submissions that the debt herein is disputed owing to the fact that the Petitioner claimed interest on the debt of Kshs. 2,338,309.32/=:, of which was not in the agreement of the parties.
13. It is of note that the issue of interest was never raised in the Company's application. Be that as it may, since the Petitioner responded to this issue in its submissions, I find that there will be no prejudice occasioned to any party if the court proceeds to evaluate the merit or otherwise of the same.
14. What amounts to a dispute of a debt? This question has been dealt with by the courts on a number of cases. The resultant principle is that the debt must be disputed in good faith and on substantial ground.
15. In the matter of **Al'amin Insurance Brookers Ltd v In the matter of the Companies Act [2009] eKLR, Kimaru, J.** in dealing with a bona fide or a dispute based on good faith, quoted with approval the decision in **MANN VS GOLDSTEIN [1968] 1 WLR 1091** as follows:

***"In Mann vs Goldstein [1968] 1WLR 1091 at page 1095 Ungood-Thomas J held that:***

***'...In re Welsh Brick Industries, Lord Greene M.R. treated a bona fide claim as being a claim based on some substantial ground when he referred to "considering whether or not the dispute is a bona fide dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action." And, so far as is material here, the winding up process provides that the petition shall be presented by a creditor and that the winding up order shall be on the ground that the company is unable to pay its debts.'*** "

16. The learned Judge also quoted from **Halsbury's Laws of England** as follows;

***"The parties to this application are more or less agreed on the principles to be considered by***

***this court in determining whether or not to grant the orders sought by the company. They both relied on a citation in Vol. 7 (3) of the Halsbury's Laws of England, 4th Edition, 2004 reissue at paragraph 452 which states as follows:***

***'A winding up order may not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on a substantial ground.'*** ”

17. Again in the case of **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.
18. Thus an analysis of the above cases reveals that where a debt is disputed in a winding up cause, the same must be bona fide or made in good faith. The dispute must be on substantial ground and not just on some ground which is flimsy or frivolous or without substance and which the court should, therefore, ignore.
19. In the instant case, the Company has not denied that it was supplied with the subject goods or that it indeed owes the Petitioner money. Its dispute however is that the debt herein attracted an interest that was not agreed upon by the parties. To determine the issue of interest, it would be necessary for this court to examine the agreement between the Company and Petitioner. This cannot be resolved through affidavit evidence.
20. However, it must be noted that 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.
21. 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. See the case of **In the Matter of PJ Dave Flowers Limited (2011) eKLR**.
22. Moreover in **Re Lypne 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)***

23. 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)***

24. 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.

25. I thus have to restate that in the case before me, the dispute herein is disputed on the ground that the same attracted interest that was not agreed upon by the parties. Furthermore, I also note that the Company made a series of payments after the institution of the Winding Up Cause. In my view, this paints a picture that the Company in question is not unable to pay its debts.
26. The Company cannot therefore be adjudged insolvent since it has enough funds to settle the Petitioner's claim. Furthermore, I find that the issues raised by the company with regard to terms of the agreement of payment of the goods and whether the same attracted interest on any outstanding amounts are not issues that can be resolved on affidavit evidence as I had earlier stated.
27. I am therefore satisfied that this is a disputed issues that calls for a full-fledged hearing. It is not a matter for the Company court as it is not a forum for deciding disputed debts. In any case I find that the Petitioner has alternative remedies to enforce its claim apart from a Petition for winding up. It can seek to enforce the outstanding amounts through ordinary courts.
28. For these reasons I find that the Notice of Motion dated 28<sup>th</sup> July, 2015 is merited. The Petition herein dated 8<sup>th</sup> July, 2015 and presented to this court on the same day is hereby struck out on grounds that it is an abuse of the process of court. Parties shall bear their own costs.
29. It is so ordered.

**Dated, Signed and Delivered in Court at Nairobi this 27<sup>th</sup> day of May, 2016.**

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**C. KARIUKI**

**JUDGE**