



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 351 OF 2013

CRESCENT CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

RICHFIELD INTERNATIONAL COMPANY LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion dated and filed on 13th August 2013 was brought under the provisions of Sections 1A, 1B, 63 (c) and 63 (e) of the Civil Procedure Act. Prayers Nos (1) and (2) were spent. It sought for the following orders:-
 1. **Spent.**
 2. **Spent.**
 3. **Pending the hearing and determination of the suit, a temporary injunction do issue restraining the Defendant whether by itself or through any agent's servants or howsoever from publishing any notice in the Kenya Gazette or in the press or howsoever regarding winding up proceedings pertaining to the Plaintiff.**
 4. **Such further or other orders as are necessary to give efficacy to the orders of this Court.**
 5. **Costs of this application.**

THE PLAINTIFF'S CASE

2. The application was supported by the Affidavit of Mohamed Ashraf, a director and shareholder of the Plaintiff. The same was sworn on 13th August 2013. Notably, the Plaintiff failed to file its written submissions despite being afforded an opportunity to do so more than once.
3. The Plaintiff was apprehensive that the Defendant would commence winding up proceedings against it at any time which would cause it irreparable loss and damage from the perspective of accumulated experience, experience in road construction, goodwill in the market, brand development, recognition and registration as a class A contractor, which attributes were irreplaceable.
4. It was its case that the measure to commence winding up proceedings was disproportionate and malicious on the Defendant's part. This was because it had issued the Defendant with a bank guarantee for the value of the bitumen it supplied but that the Defendant had neglected to call in

- the guarantee within the stipulated period.
5. It therefore urged the Court to allow its prayers as had been sought in its application.

THE DEFENDANT'S CASE

6. In response to the said application, Daula Omar, the Defendant's Director swore a Replying affidavit on 3rd September 2013. It was filed on even date. The Defendant's Written Submissions were dated 24th June 2014 and filed on 25th June 2014.
7. The Defendant's case was that there was no valid reason why the Plaintiff had not made payments for the bitumen it had supplied it. It was its position that the Plaintiff was unable to pay its debts and it was only just and equitable that it be wound up. It was also its case that when it presented the guarantee to the Plaintiff's Bank for settlement of the same, the Bank informed it that the same was for a limited period of time and could not be extended to cover the liability.
8. It therefore urged the court to dismiss the Plaintiff's said application with costs to it.

LEGAL ANALYSIS

9. It was not disputed that the Plaintiff and the Defendant had entered into a contract for the supply of Bitumen, which the Defendant duly supplied. The total price of the bitumen was Kshs 18,600,000/=. However, the Plaintiff failed to pay the said amount which then prompted the Defendant's intentions to commence winding up proceedings against it.
10. The Plaintiff averred it had issued the Defendant with an irrevocable bank guarantee for the value of the bitumen but it neglected to call in the guarantee in time. It was its contention that it subsequently experienced cash flow problems and were unable to arrange for a replacement of the guarantee facility. The Plaintiff alleged that due to delays in payments by the Government, it was unable to pay the Defendant. In reply thereto, it was the Defendant's assertion that the Bank guarantee was only supposed to be an assurance of payment and that it was the Plaintiff's obligation to ensure that payment for the goods was made.
11. The court was of the view that the Plaintiff's cash flow problems or whatever hurdles it was facing with regard to payment of the goods supplied should not in any way prevent the Defendant from legally pursuing its rights. Indeed, the Defendant lawfully issued the Plaintiff with a Statutory Notice under Section 220 of the Companies Act 486 (Laws of Kenya) demanding the payment of the outstanding amount. It further informed the Plaintiff that it would petition the High Court for a winding up order in the event that it did not settle the outstanding payment.
12. Section 220 of the Companies Act defines the inability to pay debts. Section 220 (a) which is relevant in this matter provides as follows:-

“A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;..”

13. In addition, Section 219 (e) of the same Act provides that a company may be wound up by the Court if it is unable to pay its debts. It is worthy to note that the debt herein was not disputed and the Plaintiff had not provided any proof that it had settled the debt despite being served with a Statutory Notice by the Defendant under Section 220 of the Companies Act. As the Plaintiff had only paid a sum of Kshs 5,000,000/= after the commencement of the proceedings, the process of petitioning of winding up of the Plaintiff could not then have been said to have been unlawful.
14. The court found that the Plaintiff had not laid any basis for the court to prevent the Defendant from lawfully pursuing its rights in terms of commencing the winding up proceedings. It could not seek orders to circumvent a perfectly legal process. Be that as it may, it should not be lost that a winding up order is not automatic and has to be justified before the court can grant the same. Appreciably the issue of whether or not the Defendant was entitled to a winding up order was not

within the preserve of this application for the reason that the same would have to be determined once a winding up petition against the Plaintiff is presented to the court by the Defendant.

15. For the foregoing reasons, this court was of the view that the Plaintiff had not established a *prima facie* case as enunciated in the celebrated case of **Giella vs Cassman Brown & Co Ltd [1973] E.A.** or demonstrate that it had met the other two (2) criteria set put in the said case.

DISPOSITION

16. In the circumstances foregoing, the upshot of this court's ruling was that the Plaintiff's Notice of Motion dated 13th August 2013 and filed on the same day was not merited and the same is dismissed with costs to the Defendant herein.

17. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of March 2015

J. KAMAU

JUDGE