



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALRY DIVISION**

**WINDING UP CASE NO 29 OF 2012**

**IN THE MATTER OF EAGLE AFRICA INSURANCE BORKERS KENYA LIMITED**

**AND**

**IN THE MATTER OF COMPANIES ACT CAP 486 OF THE LAWS OF KENYA**

**JUDGMENT**

**INTRODUCTION**

1. In a Petition dated 8<sup>th</sup> November 2012 and filed on 9<sup>th</sup> November 2012, the Petitioner sought the following orders:-
  - a. **That the company herein, Eagle Africa Insurance Brokers Limited, be wound up;**
  - b. **That the costs of this Petition be borne by the Company; and**
  - c. **Any other or further Orders that this court may deem fit and just to grant in the circumstances.**
  
2. On 19<sup>th</sup> March 2014, this court delivered a Ruling in which it ordered as follows:-
  1. **That the Petitioner’s Petition dated and filed on 8<sup>th</sup> November 2012 be and is hereby adjourned to a date to be mutually agreed upon by the parties when this matter will be mentioned with a view to the parties informing the court of the reconciled amount due and owing by the Company to the Petitioner.**
  2. **The Company shall deposit a sum of Kshs 2,200,365.85 in an interest earning escrow account in a reputable bank to be opened in the joint names of advocates for the Petitioner and the Company within thirty (30) days from the date of this order until further orders by the court, failing which the Petitioner will be at liberty to move the court for appropriate orders and/or directions.**
  3. **For the avoidance of doubt, order number (1) and (2) herein are independent, separate and distinct and must be adhered to strictly as has been directed by the court. None is dependent on the other.**
  
3. This order was informed by the provisions of Section 222 (1) of the Companies Act Cap 486 (Laws of Kenya) that provide as follows:-

**“On hearing a winding-up petition, the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court**

**shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of these assets or that the company has no assets.”**

4. Parties appeared in court severally after the said Ruling with a view to recording a consent. However, on 16<sup>th</sup> December 2014, both parties told this court that they had been unable to reconcile the accounts and urged it to deliver a judgment based on their written submissions. The Petitioner’s Written Submissions were dated 20<sup>th</sup> November 2013 while those of the Company were dated 5<sup>th</sup> December 2013 and filed on 6<sup>th</sup> December 2013.

## **LEGAL ANALYSIS**

5. The court considered the provisions of Section 220 of the Companies Act that provides that a company may be wound up:-
  - a. **if a Creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due had 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; or...**
  - b. ...
  - c. **if it is proved to the satisfaction of the court that the Company is unable to pay its debts, and in determining whether a Company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.”**
6. In Paragraph 35 and 38 of its said Ruling, the court observed that the Petitioner issued the Company with the requisite notice under Section 220 (a) of the Companies Act on 1<sup>st</sup> July 2011. This was the three (3) week period contemplated under the said provision. This would essentially mean that a winding-up order would have been issued herein if the court was satisfied that the Company was unable to pay its debts.
7. As could be seen in Paragraph 40 of the said Ruling, the only amount both parties agreed had not been paid by the Company was the sum of Kshs 2,200,365.85, which on 16<sup>th</sup> December 2014, they informed the court had been deposited in a joint interest escrow account at Consolidated Bank of Kenya as had been ordered by the court.
8. Notably, in Paragraph 39 of the said Ruling, the court had stated that a proposal by the Company to liquidate the amounts due to the Petitioner did not amount to inability to pay the said monies. It did also appear to the court that the Petitioner had a claim that was substantially disputed due to a great variance of the reconciliation of accounts. Indeed, in Paragraph 42 of the said Ruling, the court observed that if this was a civil claim, the Petitioner would have been required to prove its claim to the required standard.
9. In considering whether or not to wind-up a company, the court must be satisfied that there is no other way that a creditor would be able to recover its monies from such a company. The purpose of a winding-up petition ought not to exert pressure on a debtor to pay a debt but rather there must be sufficient evidence to demonstrate that there is a genuine debt that is not substantially disputed - **See Bankruptcy & Winding Up Cause No 23 of 1981 In the matter of Winding Up of Wildlife Shop Limited.**
10. The Petitioner did not provide the court with any cogent evidence to demonstrate that the Company was unable to pay its claim. On the other hand, the payment of the said sum of Kshs 2,200,365.85 in the joint interest earning escrow account in the names of the advocates of the parties was sufficient for the court to find that the Company was not unable to pay the Petitioner’s debt but rather that this was a suitable case where the dispute between the parties required to be ventilated at trial.
11. Indeed, the Petitioner would find itself in an awkward position if the Company herein was wound up yet there were available funds that would settle its claim in full. Its submissions and claim in respect of the Company’s inability to pay the said debt appeared to have been dissipated by the

deposit of the said sum.

12. Having considered the pleadings, written submissions and case law in respect of the respective parties' cases, the court was not satisfied that it would be just and equitable to wind-up the Company herein. The monies in dispute are well secured in an escrow account that would give both parties an opportunity to have the matter heard and determined by way of trial. The court could not for a fact establish the exact amount the Company owed the Petitioner as its jurisdiction was limited to granting a winding-up order against the Company herein. For the foregoing reasons, the Petitioner herein was not entitled to a winding-up order against the Company.

### **DISPOSITION**

13. Accordingly, the Petitioner's Petition dated 8<sup>th</sup> November 2012 and filed on 9<sup>th</sup> November 2012 was not merited and the same is hereby dismissed.

14. However, as the Company paid part of the Petitioner's claim which it ought to have paid upon demand after filing of the Petition herein, each party shall bear its own costs.

15. For avoidance of doubt, the sum of Kshs 2,200,365.85 that was deposited in a joint Escrow Account in the names of the advocates of the parties herein, shall remain so deposited until the final determination of the dispute between them.

16. It is so ordered.

**DATED and DELIVERED at NAIROBI this 22<sup>nd</sup> day of April 2015**

**J. KAMAU**

**JUDGE**