



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**WINDING UP CAUSE NO 29 OF 2012**  
**IN THE MATTER OF EAGLE AFRICA INSURANCE BROKERS KENYA LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA**  
**RULING**

**INTRODUCTION**

1. Acacia Medical Centre Limited (hereinafter referred as “the Petitioner”) filed the Petition herein against Eagle Africa Insurance Brokers Limited (hereinafter referred to as “the Company”) on 9<sup>th</sup> November 2012. The said Petition was dated 8<sup>th</sup> November 2012. The said Petitioner sought the following orders:-
  1. **That the company herein, Eagle Africa Insurance Brokers Limited, be wound up;**
  2. **That the costs of this Petition be borne by the Company; and**
  3. **Any other or further Orders that this court may deem fit and just to grant in the circumstances.**

**AFFIDAVIT EVIDENCE**

2. The facts of the said Petition were verified by Anne Gitau, the Petitioner’s General Manger in an Affidavit Verifying Petition also sworn and filed on 8<sup>th</sup> November 2012. Copies of documents in support of the said Petition were annexed thereto.
3. On 11<sup>th</sup> December 2012, the Company filed an Affidavit in Opposition to winding up. The same was sworn on 10<sup>th</sup> December 2012 by its Chief Executive Officer, Sam Ncheeri.
4. In the said affidavit, the deponent admitted that there was in existence a contract between the Petitioner and the Company in which the Petitioner was to provide various medical services to the Company’s clients at certain agreed terms.
5. He deponed that once a client/patient received services from the Petitioner, the Petitioner was expected to avail to the Company an invoice containing other details, the date the patient was attended to, the patient’s full details and the nature of the medicine dispensed. Without such an invoice, he stated that it was not possible to honour the invoice.
6. It was the deponent’s further averment that the Petitioner did not avail to the Company records/invoices for the claim of Kshs 4,303,496/= but that the Company paid a sum of Kshs 2,816,332/= as invoices availed to the Company and supported.
7. Further, he stated that the Petitioner forwarded to the Company invoices for a sum of Kshs

- 156,844/= which the Company informed the Petitioner it would not honour as the clients were not covered by the Company but that the Petitioner nonetheless insisted on the said amount. The Company, he said, also refused to pay bills amounting to Kshs 24,116/= as the same was payable by another Company.
8. He also contended that the Petitioner had forwarded to it a claim amounting to Kshs 1,306,177.72 without supporting it with itemised bills/invoices giving the relevant information. He also stated that it would be unfair for the Petitioner to insist on payment when the Company could not establish whether or not a client was insured.
  9. It was his averment that the Company was solvent and that it had been actually liquidating the admitted sum of Kshs 1,580,027.68 by instalments when the Petitioner filed the Petition herein. He contended that the Petitioner should have filed a civil suit and obtained summary judgement instead of filing the winding up cause herein whose purpose was to embarrass the Company. Copies of the analyses of paid and undisputed amounts were annexed to the deponent's affidavit.

### **LEGAL SUBMISSIONS BY THE PETITIONER**

10. The Petitioner filed its written submissions and List of Authorities both dated 20<sup>th</sup> November 2013 on 22<sup>nd</sup> November 2013.
11. In its submissions, the Petitioner argued that this court has jurisdiction to wind up the Company herein by dint of Section 218 of the Companies Act Cap 486 (Laws of Kenya) (hereinafter referred to as "the Act").
12. The Petitioner explained that it fully provided medical services to the Company's clients and that the Company defaulted to effect payments to it as and when the same fell due. It pointed out that the debt was for a sum of Kshs 4,303,469.55 exclusive of an accumulated interest. The said sum was made up as follows:-

**Old debt (2007 – 2008) – Kshs 3,803,337.28**

**Current debt (2009 – 2011) – Kshs 500,132.28**

**Kshs 4,303,469.55**

13. It averred that the Company admitted owing it a sum of Kshs 1,580,027.68 but that as at the time of filing the Petition herein, the Company had only paid a sum of Kshs 500,000/=. However, the Petitioner pointed out that the Company had since the filing of the Petition herein paid a sum of Kshs 1,603,205.70/= leaving a balance of Kshs 2,200,263.86.
14. The Petitioner's case was that its submissions were based on the ground that the Company was unable to pay the debt, that it was just and equitable to wind up the Company and that the Company was fully aware of all outstanding invoices as they had been availed to it.
15. It relied on Section 219 (e) of the Act that provides that a Company may be wound up if it is unable to pay its debts and Section 220 of the Act which defines "**inability to pay debts**". The circumstances of such inability are expressed as follows:-
  - 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; or**
  - b. **if execution or other process issued on a judgement, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or**
  - 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.**
16. It also referred the court to **Palmers Company Law, Volume 1** which states that "**the fact that the Petitioner has made repeated application for payment, and that the Company has neglected to pay, affords cogent evidence that it is unable to pay its debts, and this is the**

- evidence generally relied on.”** (*Emphasis Petitioner’s*)
17. It therefore submitted that failure by the Company to pay it the sum of Kshs 806,469.56 pursuant to several demands could only be deemed that the Company were unable to pay its debts, and that the excuses by the Company was merely to resist the claim.
18. It relied on the case of **Bankruptcy & Winding Up Cause No 23 of 1981 In the matter of Winding Up of Wildlife Shop Limited** where Hancox J stated as follows:-

**“In my view there is a genuine debt, which is not substantially disputed, followed by the notice under Section 220 (a) of the Act. In these circumstances the Petitioning Creditor is, in my judgement, entitled to a winding-up order, which I make accordingly.”**

19. The failure by the Company to pay the said monies for a period of more than five (5) years was what the Petitioner urged this court to find that it was just and equitable to wind up the Company as envisaged in Section 219 (f) of the Act which provides that a Company may be wound up if **“the court is of the opinion that it is just and equitable that the Company should be wound up.”**
20. It was the Petitioner’s further argument that the debt had remained unpaid for a period of over three (3) weeks since the statutory notice was issued. The Petitioner referred the court to the case of **Winding Up Cause No 39 of 2010 In the matter of Winding Up of Dairy World Limited** where Ogola J held that it was just and equitable to wind up the Company therein as it had failed to pay the Petitioner therein a sum of Kshs 12,766,408/= and interest, three (3) months after a demand had been sent to it to pay the said sum.
21. The Petitioner also pointed out that the payments made after the filing of the Petition herein were void in law as could be seen in Section 224 of the Act which stipulates as follows:-

**“In a winding up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall, unless the court otherwise orders, be void.”**

22. It referred the court to the case of **Highlands Commercial Union Limited -Vs- Abdulmales Ahmed Jamal [1957] EA 641** in this regard.
23. The Petitioner therefore urged this court to wind up the Company herein or adjourn the hearing conditionally or unconditionally or make an interim order or any other order it would think fit in the circumstances with costs being borne by the Company.

#### **LEGAL SUBMISSIONS BY THE COMPANY**

24. In its written submissions dated 5<sup>th</sup> December 2013 and filed on 6<sup>th</sup> December 2013, the Company submitted that no ground existed for its winding up. It argued that it proposed to liquidate the sum of Kshs 1,508,027.68, which was not disputed, in instalments as the invoices were availed to it almost five (5) years after they were due. It also contended that the sum of Kshs 2,200,263.83 had not been paid as the same had not been supported by any documentation.
25. It distinguished the cases of **Winding Up Cause No 39 of 2010 In the matter of Dairy World Limited** in that the Petition therein, the Company did not prefer any response and **Bankruptcy & Winding Up Cause No 23 of 1981 In the matter of Winding Up of Wildlife Shop Limited** on the ground that the same related to rent arrears unlike in the present case where the service had to be proved for a debt to be deemed as existing.
26. It contended that it had over one thousand (1,000) employees who would be rendered unemployed if the Company was wound up. It thus argued that the maxim of equity would dictate against such an order being granted.
27. The Company indicated that in the event the court believed that the Petitioner had an arguable Petition, the Company was ready to deposit the disputed sum of Kshs 2,200,268.68 in an escrow account within seven (7) days. It urged the court to direct the Petitioner to file a civil claim where it could prove its case.
28. It was the Company’s argument that it was solid, liquid and capable to pay all its debts and that

the present Petition, being premature and extortionist, ought to be dismissed.

### **FURTHER SUBMISSIONS BY THE PETITIONER**

29. Counsel for both parties orally highlighted their respective written submissions. In his oral submissions which were in response to the Company's oral submissions, counsel for the Petitioner contended that the Company's analysis marked "SN 2" attached to its affidavit showed invoices dating as far back to 2007 and that it was therefore not true that the Petitioner did not avail the said invoices to the Company.
30. He added that the Petitioner was not privy to the contract between the Company and its clients and it should therefore not be dragged into their disputes especially because it had already rendered services. This was in response to the submissions by counsel for the Company that the Company was willing to pay the money but that it needed to know the companies its clients were working for or which insurance company had covered such clients for medical cover before it could settle the invoices.

### **LEGAL ANALYSIS**

31. It is not in dispute that there was a valid and existing contract between the Petitioner and the Company wherein the Petitioner provided medical services to the Company's clients and the Company paid the Petitioner once those services were rendered. It is also not in dispute that the sum the Petitioner is claiming from the Company is Kshs 2,200,363.85 which the Company informed the court it would be willing to deposit in an escrow account as the Petitioner files a civil suit and proves its claim.
32. What is in dispute, however, is whether or not the said sum is payable by the Company to the Petitioner due to a lack of documentation to support the same.
33. In its affidavit in opposition to the Winding Up, the Company annexed schedules showing analyses for paid and disputed invoices respectively. In the disputed analysis, it shows some patient's dependants were not covered, some members were not covered under the medical policies, some claims did not belong to the Company while there were no records in respect of some patients.
34. The Petitioner argued that the Company would not have been able to have provided the details in the said analyses if it was indeed true as the Company had asserted, that the Petitioner did not forward invoices to it. On the other hand, the Company submitted that it needed additional details including particulars of which insurance company had provided medical insurance cover before it could effect payment of the sum of Kshs 2,200,363.85.
35. Perusal of the correspondence exchanged between the Company and the Petitioner, annexed to the Petition, shows that the Company disputed some invoices and required to reconcile its accounts. It had, however, acknowledged a sum of Kshs 1,580,027.68 which it undertook to pay in three (3) equal monthly instalments. This was on 11<sup>th</sup> July 2011.
36. The Petitioner wrote to the Company a letter dated 25<sup>th</sup> July 2011 rejecting the liquidation of the said sum in instalments and demanded that the amount be paid within thirty (30) days. Although the Company paid a sum of Kshs 500,000/= to the Petitioner, the balance was not paid leading to the filing of the Petition herein, the Statutory Notice dated 28<sup>th</sup> June 2011 having been served upon the Company on 1<sup>st</sup> July 2011.
37. It is evident from Section 220 (a) of the Act that failure to pay a debt after a three (3) weeks demand is one of the definitions of inability to pay debts. Section 220 (c) of the Act gives a window of opportunity to the court to establish if it has been proved to its satisfaction, if a company is unable to pay its debts taking into account the contingent and prospective liabilities of a company.
38. The three (3) weeks contemplated under Section 220 of the Act expired on 22<sup>nd</sup> July 2011. Several letters were exchanged trying to resolve the issue of the monies.
39. The several correspondence between the Petitioner's and the Company's advocates clearly show that it was not that the Company was unable to pay its debts but rather it was because its proposals on how to liquidate the admitted amounts and reconciliation of the disputed figures were rejected

- by the Petitioner. It is the finding of this court that a proposal by a party to liquidate any monies in instalments does not amount to an inability to pay the said monies.
40. While the Petitioner had argued that the payment of Kshs 1,603,205.70 by the Company to the Petitioner was void by virtue of Section 224 of the Act, it is apparent that the Company was not insolvent. A company that is unable to pay debts could not have paid such an amount especially bearing in mind that the Petitioner was claiming a total sum of Kshs 4,303,469.56 and now all that remained was Kshs 2,200,363.85.
41. In view of the fact that the issue of disposition of the Company's property was not one in dispute, it will not be necessary for this court to deal with the same. Suffice it to state that the court has noted the Petitioner's submissions in respect of this issue.
42. This court finds that if this was a civil matter, the Petitioner would have had to prove its claim. Relying on Section 220 (1) of the Act to wind up the company herein would therefore be such a drastic step for this court to take. It would indeed not be just and equitable for the Company to be wound up as doing so would be proceeding on the basis that this court has been satisfied that the Company has been unable to pay the debt herein.
43. This court would agree with the submission by the Company that the case of **Bankruptcy and Winding Up Cause No 28 of 1981 In the Matter of Winding Up of Wildlife Shop Limited** was distinguishable from the facts of this case in that there does appear to be a genuine dispute between the Petitioner and the Company that needs to be adequately ventilated.
44. Similarly, the circumstances in the case of **Winding Up Cause No 39 of 2010 In the matter of Winding Up of Dairy World Limited** are different from this case as the same proceeded *ex parte*. While the same is not binding on this court but is merely persuasive, this court notes from the decision of Ogola J that winding up of a company is not automatic and that a court can refuse to wind up such a company if there is a plausible defence. He stated as follows:-

**“The Company, despite being served has opted not to come to court and defend the petition. I would therefore not be able to know whether or not the Company had a defence.”**

45. Section 222 (1) of the Act does give the court several powers on hearing a winding up petition. The same provides 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 those assets or that the company has no assets.”**

46. As this court has several options it can adopt and which the Petitioner did allude to in its written submissions, this court is of the considered view that it would be just and equitable to adjourn the hearing of the petition herein and make an interim order to enable the parties herein reconcile the accounts herein.

## **DISPOSITION**

47. Having heard oral submissions by counsel for the Petitioner and the Company and having read their respective written submissions and case law, this court hereby directs 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 the 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 above are independent, separate and distinct and must be adhered to strictly as has been directed by the court. None is dependent on the other.

48. Orders accordingly.

**DATED SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of March, 2014.**

**J. KAMAU**

**JUDGE**