



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 1 OF 2005

IN THE MATTER OF: AFRICAN SAFARI CLUB LIMITED

-AND-

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

JUDGMENT

Introduction

1. By a Petition presented in court on 9th March, 2005 and an Amended Petition filed on 8th May 2014, **UNIVERSAL HARDWARE LIMITED** (hereinafter “**the Petitioner**”), seeks a winding up order against **AFRICAN SAFARI CLUB LIMITED** (hereinafter called “**the Company**”) on the grounds that the company is insolvent and unable to pay its debts and that it is just and equitable that the company should be wound up. The Petition alleges that the company was indebted to the Petitioner in the sum of Shs 24,181,684.55 being the amount due for goods sold and delivered by the Petitioner to the Company. The petition further alleges that a statutory notice in terms of section 220(a) of the Companies Act demanding payment within three weeks was served on the company on the 2nd February, 2005 and that more than three weeks had passed since that demand and the Company had neglected to pay or satisfy the said sum. The petition was duly verified by an affidavit of MEHUL RAWAL, a Director of the Petitioner.
2. The Company filed an Affidavit in Opposition of the Petition on 21st March 20105 and the Petitioner filed an Affidavit in Reply to the Company's affidavit on 3rd June 2005.
3. The essence of the Company's reply is that the Company was not indebted to the Petitioner as claimed and that there was a hot dispute as to the debt. The basis of the Company's dispute is that the goods supplied by the Petitioner were wrong, cheap goods for which the Petitioner had overcharged. The Company case therefore is that the debt is *bona fide* disputed and that winding up procedure should not be an avenue for collection of civil debt.
4. Upon being served with the Petition, the Company, on 17th March 2005, applied for an injunction to restrain the Petitioner from advertising the petition and for the striking out of the petition on the basis that a winding up petition cannot be used for debt collection when the debt is hotly disputed. The Application was argued before Maraga, J. (as he then was) who, by a Ruling delivered on 17th November 2006, allowed the same and struck out the Petition with costs.

5. Aggrieved by the said ruling, the Petitioner lodged an appeal, being **Mombasa Civil Appeal No. 209 of 2007**. The appeal was allowed and the Court of Appeal, in its unanimous judgment delivered on 19th June 2013, directed that the Petition does proceed for hearing on merit.
6. The Petitioner has all along been represented by Inamdar & Inamdar Advocates in this Petition. However, the Company was initially represented by Ghalia & Ghalia Advocates who were, on 5th April 2005, replaced by Nabhan Swaleh Advocates. Nabhan Swaleh Advocates filed an application to cease acting for the Company on 3rd December 2013 and the same was allowed by this court on 24th March 2014.
7. On 13th February 2014, **TOURISM FUND** filed a Notice of Intention to Appear in the Petition on the basis that it was a creditor to the Company for **Kshs. 39,664,734.00**. A similar Notice of Intention to Appear in the Petition was filed by **IQBAL M. HUSSEIN** on 19th May 2014 on the basis that he was a creditor to the Company for **Kshs. 7,812,163.00**.
8. On 20th May 2014 when the Petition came up for hearing, Mr. Omollo Advocate appeared for the Company. Mr. Omollo applied for adjournment on the basis that he was yet to receive the file from the Company's previous lawyer. Upon hearing all parties present and after considered the age of the Petition, the court declined to grant the application for adjournment and directed that the Petition proceeds for hearing. The matter accordingly proceeded and the Petitioner called one witness, MEHUL V. RAWAL, a director of the Company who testified on its behalf and was cross-examined by Mr. Omollo, learned counsel for the Company. The Company, Tourism Fund and Iqbal M. Hussein did not call any witness.

The Petitioner's Case

9. The Petitioner's case is that it supplied the Company with hardware goods worth Kshs. 24,181,684.55. The Petitioner states that despite writing a total of seven (7) demand letters on various dates between 3rd March 2004 and 14th January 2005, the Company ignored to pay the said amount. According to the Petitioner, the Company did not dispute the debt until when this Petition was filed. The Petitioner also contends that the Company is insolvent and is unable to satisfy its debt as and when demanded.

The Company's Response

10. The Company's position is that this is not a proper case to warrant winding up of the Company. That the debt is *bona fide* disputed by the Company and a winding up petition is not a legitimate means of enforcing payment of a disputed debt. The basis upon which the Company disputes the debt is that the goods supplied by the Petitioner were of substandard quality and were overcharged. The Company stated in its Affidavit in Opposition that the "Petitioner supplied wrong, cheap goods and charged for goods of first class manufacture."
11. The Company stated in the Affidavit that "the paint supplied (by the Petitioner) is materially defective and the colour has mostly faded." The Company exhibited what it called an SGS Report to show that the Classic brand supplied by the Petitioner did not conform with Kenya Bureau of Standards Specifications. I however note that the said SGS Report is dated 17th March 2005, after this Petition was filed on 9th March 2005.
12. The Company further contended that it is not true that it is insolvent and cannot satisfy its debts. It stated that it is one of the largest companies in the tourism industry in Kenya and directly employed 2,500 employees with a gross monthly payroll of Kshs. 27,000,000.00. That the Company was up to date in its payments which included monthly V.A.T payments of approximately Kshs. 4,500,000.00, PAYE of Kshs. 2,500,000.00 per month, electricity and telephone bills of Kshs. 9,500,000.00 per month and fuel costs of Kshs. 5,000,000.00 per month.
13. To demonstrate its financial ability, the Company also asserted that despite suffering a massive

fire damage on 1st September 2003 which burnt down four of its large hotels, the Company was able to rebuild two of the burnt hotels within two months of the fire. The rebuilding, the Company claimed, was done solely from the Company's own finances as the insurance claims were not settled until after one and a half years of the fire.

14. Based on the foregoing assertions, the Company contends that it is not insolvent as alleged by the Petitioner. However, these allegations as to the Company's financial capability were not backed by any documentary evidence.

The Petitioner's Reply

15. In reply to the Company's averments on the quality of the goods supplied, the Petitioner stated that the dispute related to goods supplied several months back yet there was not a single written complaint by the Company on the quality of the goods. The Petitioner contends that the Company did not reject any of the goods supplied and no details of any goods returned were entered in the Company's Goods Return Note.
16. On the claim that the goods were overcharged, the Petitioner's response was that the prices were agreed upon between the parties and the Company inserted the prices in its own LPO before the purchase.

The Issues

17. The main issue before court is whether this Petition meets the legal standards required to wind up the Company.

Analysis and Determination

18. For a winding up order to issue, there must be proof that the company is insolvent or unable to pay its debts. In the Case of **INTONA RANCH LTD V O'BRIEN [1992] KLR 149**, the Court of Appeal stated at page 159 that:

“It is settled law that the winding up order is not automatic. There must be proof of insolvency and/or inability on the part of the Company to pay its debts.”

19. The question of when a company is unable to pay its debts has been dealt with by our courts. In **RE AZETILAND CONSULTANTS LIMITED, NAIROBI WINDING UP CAUSE NO. 14 OF 2007, [2009] eKLR**, Kimaru, J. stated as follows:

“Under Section 220(a) of the Companies Act, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do. In my view, all that is required of a Petitioner under this section is to establish that the company is unable to pay a debt that is legitimately due from it. It will not do if the debt is disputed.”

20. Thus, what the Petitioner needs to demonstrate is that there is a debt for which demand has been made and no payment has been received or satisfactory explanation for non-payment offered within three weeks of the demand. If however there is a dispute as to the debt, the company should not be wound up on the basis of non-payment of the debt.
21. What amounts to a dispute of a debt? That question has been dealt with by the courts and the emergent principle is that the debt must be disputed in good faith and on substantial ground. In **Re 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.’”

22. 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.’”

23. The legal position obtaining is that the dispute as to the debt 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.

24. In Re Standard Ltd, Ex Parte Tricom Paper International BV

[2002] 2 KLR 644, Ringera, J. (as he then was) stated at page 647 as follows:

“From the foregoing authorities it is clear that if a petition is intended to enforce payment of a disputed debt, it will be treated as an abuse of the process of the court and will be struck out. However, the dispute must be predicated on substantial grounds and is not constituted by the mere fact of an affirmation by the creditor on the one hand and a denial by the debtor on the other hand.” (Emphasis mine)

25. In the instant case, the Company has not denied that it was supplied with the subject goods. Its dispute is that the goods were of substandard quality and the same were overpriced.

26. I have gone through the documents availed to court by the parties. The Petitioner started supplying the Company with the goods in issue from as early as 1st July 2002 all the way to December 2004. From the evidence on record, and particularly the Company's Goods Return Notes, there are just a few instances where the Company returned goods to the Petitioner. The returns were made in the month of July 2004 and they related to an assortment of goods worth a total of Kshs. 66,825.00. Of the goods returned, there was green paint worth Kshs. 8,400.00.

27. In my view, if the paints supplied by the Petitioner were of substandard quality as alleged, the Company should have returned the same. Save for the case mentioned, the Company used all the paints supplied by the Petitioner. The Company sought to rely on the SGS Report dated 17th March 2005 to demonstrate that the paint supplied by the Petitioner were of substandard quality. The SGS Report was prepared eight (8) days after this Petition was filed. In my view, the Company cannot use it against the Petitioner because before the Petition was filed, the Company accepted the paint as supplied by the Petitioner. One can only conclude that the said Report was prepared to defeat this Petition. Even then, the Report does not show that the paint under scrutiny were the ones supplied by the Petitioner. The Report refers to unspecified paint and makes no reference to the Petitioner at all. The issue of the quality of the paint was, in my considered view and considering what is stated above, raised by the Company in bad faith and cannot amount to a

genuine dispute regarding the debt owed.

28. On whether the Petitioner had overcharged the goods in issue, I note that the same was not also raised by the Company at the appropriate time. The Purchase Orders and the Quotations availed by the Petitioner show that the parties had agreed on the prices of the goods. That the Company is challenging the said prices in this Petition does not, in my view, amount to a *bona fide* dispute. The upshot of the foregoing is that the dispute of the debt by the Company is not founded on *bona fide* and substantial grounds. The same does not satisfy the legal standard laid down by the cases discussed earlier.

29. The Petitioner served the Company with a statutory demand notice under Section 220 (a) of the Companies Act, Cap 486 on 2nd February 2005. The Company did not respond to the said notice until 8th March 2005, a day before this Petition was filed. Section 220 of the Companies Act 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.”

30. The time frame imposed by section 220 (a) of the Companies Act is three weeks. The Company's response to the statutory demand came after three weeks had expired. Even if the response was served in time, I have discussed above that the grounds upon which the Company is disputing the debt is not *bona fide* and substantial in nature. The same cannot be used to defeat this Petition.

31. On the question of insolvency, the Company raised certain payments which it has been making including employees' salaries, V.A.T, PAYE and the reconstruction of burnt hotels in four months from the Company's own resources. These allegations were not backed by any evidence and hence cannot be used as a basis to determine the Company's solvency. As was rightly held by Kimaru, J. in **Re Azetiland Consultants Limited (supra)** under Section 220(a) of the Companies Act, a company is deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do.

Conclusion

32. Since the Petitioner's debt remains unpaid to date, and since no satisfactory explanation has been offered for the non-payment, it is only logical to conclude that the Company is insolvent and hence should be wound up.

33. I make the following orders-

- a. **The AFRICAN SAFARI CLUB LIMITED is hereby wound up.**
- b. **The Official Receiver is hereby appointed provisional liquidator.**
- c. **The Petitioner is awarded the costs of the Petition to be paid out of the assets of the Company.**

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE