



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
WINDING UP CAUSE NO. 5 OF 2011
IN THE MATTER OF
COMPLETE TRANSPORT SOLUTIONS LIMITED
AND
IN MATTER OF THE COMPANIES ACT CAP 486 OF THE LAWS OF KENYA
JUDGMENT

1. By a Winding up Petition filed on 19th April 2011, the Petitioner, Hezekiah N. Njenga (hereinafter called “the Petitioner”) petitioned this court to wind up Complete Transport Solution Limited (hereinafter called “the Company”) on grounds that the company was unable to satisfy a judgment in favour of the Petitioner in the sum of Kshs. 6,136,903/-. The relief sought is premised on Sections 219 and 222 of the Companies Act. The Petition is supported by the affidavit of the Petitioner sworn on 12th April 2011 as well as by his statement sworn on the same date.

2. The case by the Petitioner is that he is a motor vehicle spare parts supplier. At the request of the company, he supplied the company with motor vehicle spare parts, on diverse dates at the request of the company. As at June 2010, the company was indebted to him in the sum of Kshs. 6,373,197/-. Upon his demand, the company only paid a sum of Kshs. 303, 187/-. It failed to pay the balance despite demand and notice of intention to sue. Subsequently, he filed suit being HCCC No. 717 of 2010 and obtained a decree for the sum of Kshs. 5,910,876/- which was issued on 18th January 2011. Execution of the decree by way of attachment did not yield any recoveries hence the institution of the winding up proceedings against the company. It is the petitioner’s contention that the debt is not settled and remains undisputed. Further, the company is in heavy debt and cash flow problems and has indeed closed its offices. It is therefore just and equitable that the company should be wound up by this court.

3. The petition was served upon the company on 5th April 2011 as per an affidavit of service sworn by Charles K. Irimu, a duly authorized court process server. The petition was then advertised in the Standard newspaper on 12th September 2011 and in the Kenya Gazette on 29th July 2011. The company did not respond or appear to the winding up cause. The registrar allowed the petition to proceed in court. The petition was then listed for directions on 21st September 2011 when the same was fixed for hearing on 25th November 2011. On this date, hearing of the petition was adjourned owing to unavailability of counsel for the Petitioner. The Petition was then fixed afresh for hearing on 17th February 2012. Again, the company failed to respond to the petition.

4. Hearing of the petition proceeded *ex parte* 17th February 2012 aforesaid. The Petitioner testified under oath in support of the winding up of the company and essentially reiterated the matters contained in his supporting affidavit and statement. These are as summarized in paragraph 2 of this judgment. He produced the decree forming the basis of the winding up cause and the warrants of attachment in execution of the decree as exhibits in the petition.

5. I have carefully considered the oral and affidavit evidence tendered in support of the petition. I have also considered the written submissions by counsel for the petitioner.

6. The issues arising for determination are two-fold; whether the petitioner has met the legal requirements for bringing a winding up petition, and, secondly, whether a case has been made for appointment of an interim liquidator to take over the business of the company for purposes of satisfaction of its debts and liquidation of its assets.

7. With regard to whether the legal merits of instituting winding up proceedings have been met, it is instructive that the winding up petition has not been opposed. The court's role in this regard is therefore to satisfy itself that the legal requirements for bringing up of a winding up petition have been fulfilled in the present case.

8. The legal parameters for bringing a winding up petition can be rendered as follows: Section 219 of the Companies Act provides that a company may be wound up if, *inter alia*, it is unable to pay its debts. Section 220 of the Act provides that a company is deemed to be unable to pay its debts if, *inter alia*, any judgment or decree of any court in favour of a creditor is returned unsatisfied in whole or in part. An application for winding up of a company should then be brought by way of a petition presented either by the company or by any creditor or contributory or by all or any of these (S. 221). The Petition is then required to be advertised in the Kenya Gazette and in at least one local newspaper.

9. Applying the foregoing parameters to the present case, the petition is brought pursuant to a decree of this court issued in HCCC No. 717 of 2010. It is therefore obvious that the company is indebted to the petitioner having failed to satisfy the decretal sum. Secondly, the requirement to issue notice to the company has also been met as a statutory notice was served upon the company on 1st April 2011. The petition was then advertised in the Kenya Gazette on 29th July 2011 and in the Standard newspaper on 12th September 2011 as already indicated above. Consequently, I am satisfied that the petitioner has met all the legal requirements for the bringing of the winding up petition and the petition is properly before the court.

10. With regard to the prayer for appointment of an interim liquidator for the company, **Kasango J** (as she then was) in **Winding Up Cause no. 35 of 2005 [2006] EKLK In The matter Of Nyuki Ltd** held that a petitioner ought to show sufficient grounds for the court to allow appointment of an interim liquidator. In the present case, the grounds put forth by the Petitioner is that the company has closed down its offices and the directors are operating from remote locations, mainly in their houses. I think the conduct of the directors of the company sufficiently proves that the assets of the company are no longer secure and risk dissipation before the petitioner's debt is satisfied. I am therefore convinced that this is a proper case for appointment of an interim liquidator to secure whatever assets of the company as are still traceable.

11. For the above reasons, I am inclined to allow the petition as prayed and to order that a winding up order do issue for the winding up of Complete Transport Solution Limited by this court in accordance with the Companies Act. Further, and pursuant to Section 230 of the Companies Act, cap 486, I hereby appoint the Official Receiver to be the interim liquidator for purposes of winding up of the company.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19TH DAY OF APRIL 2012.

J. M. MUTAVA

JUDGE