



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
WINDING UP CAUSE 17 OF 2010
IN THE MATTER OF KENYA WINE AGENCIES LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT (CHAPTER 486) LAWS OF KENYA

RULING

By an amended Winding up Petition dated 4th October, 2010, Mr. Jaswinder S. Obhrai (a creditor hereinafter referred to as “*the Petitioner*”) sought orders that Kenya Wine Agencies Ltd (hereinafter referred to as “*the Company*”) be wound up under the provisions of the *Companies Act, (Cap 486, Laws of Kenya)*.

The company reacted to the Petition by filing an application by Chamber Summons dated 18th August, 2010 and taken out under **Rules 5(2), 7 (2) and 203 of the Companies (Winding Up) Rules, The Companies (High Court) Rules, Order 6 Rule 13 (1) (d), Sections 1A, 63 (c) and (e) of the Civil Procedure Act**, the inherent powers and jurisdiction of the court, and all other enabling provisions of the Law. That application seeks the following orders-

1... (*Spent*)

2. *That pending the hearing and determination of this Chamber Summons prayers 3, 4, and 5 there be an Order of stay of further proceedings of this Petition including advertisement and/or the Petitioner be restrained from publishing the Notice of Petition in the Kenya Gazette and/or in any newspaper published in Kenya.*

3. *That the Petition herein be struck out and dismissed with costs.*

4. *That the court make such orders(s) as it may deem just and appropriate.*

5. *That the costs of this application be provided for.*

The application is supported by the annexed affidavit of Cyprian Wekesa, the Company’s Advocate, sworn on 19th August, 2010. It is also supported to a large measure by the affidavit sworn by Doris M. Thangei, the Company Secretary/Legal Officer, which affidavit was sworn on 18th August, 2010. It is also premised on the grounds that-

(a) *The Petition is a blatant abuse of the process of the Court as the Petitioner’s alleged debt is disputed on bona fide and substantial grounds, and the Petitioner is not a creditor and does not*

therefore have the locus standi to present a winding up petition as it has purported to do.

- (b) The Petition has been brought in bad faith, mala fides and for collateral purposes to advance the Agenda of Technomatic Limited t/a Promopack Company in HCCC No. 398 of 2005 as against the Company.*
- (c) The petition is incurably defective and incompetent in that;*
 - (i) It was commenced in breach of the mandatory provisions of Section 220 (a) of the Companies Act in that no demand in compliance with that section has ever been served upon the Company.*
 - (ii) The Petition is predicated on a claim in the future and therefore speculative and illusory.*
 - (iii) The Petition is not compliant, prima facie, with its stated executory parameters.*
 - (iv) There has been no compliance with Rules 10 and 22 of the Companies (Winding up Rules).*
 - (v) There is no endorsed promissory note exhibited and the same has been disputed as due in HCCC 398 of 2005.*
- (d) If the patently defective Petition is advertised while awaiting the Registrar's decision on its compliance or otherwise with the Rules, a gross injustice will be perpetrated against the Company for such advertisement will cause substantial and irreparable damage to the business of the Company concerned.*
- (e) The promissory note on which the Petitioner premises its petition is the subject of litigation in HCCC No. 398 of 2005 – Technomatic Limited t/a Promopack –vs- Kenya Wine Agencies Ltd and pursuant to which the Plaintiff in July 2007 failed to obtain summary judgment and it is a gross abuse of the court process for the Petitioner to pretend to commence a petition on a promissory note that is an exhibit in HCCC No. 398 of 2005 which is sub judice and absolutely disputed as due in that suit.*
- (f) The Petition is premised on fraud, intimidation and blackmail and is a gross abuse of the Court process.*
- (g) The Petition is presented ostensibly for a Winding up Order but really for another purpose of putting pressure, intimidating, seeking to embarrass and damage the Company and its business.*
- (h) There is immediate danger to the business of the Company, which has been developed since 1969, of being damaged if the Petitioner goes ahead to publish the Petition in the Kenya Gazette daily newspapers.*

With leave of the court, the parties filed skeleton submissions which I have duly considered. It is instructive that the Petitioner's locus for seeking to wind up the Company is a promissory note which is the subject matter and strenuously contested in HCCC No. 398 of 2005, which is still pending in Court for hearing and determination. According to paragraph 7 of the Petition, the Petitioner blames the Company for failing to honour a demand from a creditor within 7 days from the receipt thereof. That paragraph reads thus-

“... it is clearly the position that the company is in breach of the Companies Act for failing to honour a demand from a creditor within 7 days from receipt thereof.”

Sadly, this statement does not specify the exact date when the Company was served with the relevant notice. Indeed, the point is taken up by the Company itself contending that it was never served with the demand notice, and that if such notice had been served on the Company, the latter would have contested it

on several grounds. Against that background, it becomes necessary to consider the circumstances under which a Company may be wound up by the Court, and the procedure to be followed.

Section 218 of the Companies Act confers on the High Court jurisdiction to wind up any company registered in Kenya. The circumstances in which a Company may be wound up by the court are set out in **Section 219** of the Act and the ground upon which the Company in this case is sought to be wound up are to be found in **Section 219 (e)** which reads thus-

“219. A company may be wound up by the court if-

(e) ... the company is unable to pay its debts.”

The inability of a Company to pay its debt is defined in **Section 220** of the Companies Act which states that-

“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; or

(b) if execution or other process issued on a judgment, 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.”

From the wording of this section, it is evident that for the section to apply, three conditions must be established. These are -

(i) It must be shown that the company owes the creditor more than one thousand shillings.

(ii) That the creditor has served on the company by leaving it at the company’s registered office a demand under his hand requiring the company to pay the sum due...

(iii) That the company has for three weeks thereafter neglected to pay the sum or to secure it to the reasonable satisfaction of the creditor.

It is significant that in paragraphs 5 and 6 of the Petition, the Petitioner does not state the date on which he demanded payment under **Section 220** (supra). Instead, he moves on to state in paragraph 7 of the Petition that the Company failed to honour a demand from a creditor within 7 days from the receipt thereof, yet, **Section 220** gives the Company up to three weeks from the date of service of the demand note to pay the sum due. The only inference that one can draw from the Petitioner’s statement is that **Section 220** was not complied with to the letter and, conversely, that section has been breached. He is thereby giving the alleged debtor seven days within which to pay whereas the law grants the debtor 21 days. This observation is reinforced by the last two paragraphs of a letter dated 9th April, 2009, addressed by the Petitioner’s Advocate to the Company’s Advocate in the following terms -

1. Our client purchased the promissory note from Technomatic Limited t/a Promopack Company and wrote to your client under certificate for posting on the 5th of December 2007 demanding settlement of the same (copy attached).

2. Our instructions are therefore to advise that if your client does not think it necessary to settle

the face value of the said promissory note together with interest accrued, our client will give formal demand under Section 220 of the Companies Act, Chapter 486 Laws of Kenya and thereafter commence winding up proceedings against your client at their own risks as to costs and attendant consequences arising therefrom.

The last paragraph demonstrates clearly that until the date of that letter, **Section 220** of the **Companies Act** had yet to be complied with. As observed earlier, there is no indication as to when the demand was served upon the Company in the manner prescribed under that Section, and yet, the creditor was giving the company seven days within which to pay. This demand was, therefore, fault on two fronts- firstly, it does not state the date on which it was served and, secondly, it gives the company only seven days to repay the alleged debt in stead of the statutory 21 days.

For the above reasons, I find that the petition herein was filed prematurely and the Company's inability to pay it debt has not been fully and properly tested. Furthermore, paragraph 6 of the Further Amended Plaint dated 5th October, 2006 and filed in court on 6th October, 2006 demonstrates clearly that the amount of money in the promissory note was, prima facie, interwoven with the total sum claimed. In the circumstances, one can understand why the court declined to given summary judgment in this matter for that sum alone.

In sum, I find that the Petitioner is resorting to Winding up as a means of enforcing a doubtful claim which is genuinely contested, and his Petition raises many questions of a procedural as well as substantive nature. Consequently, I find that the Petition for the Winding up of the Company in this matter is premature and unmerited at this stage. It is accordingly hereby struck out with costs to the Company.

It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of July, 2012

L. NJAGI
JUDGE