



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Winding Up Cause 4 of 2011**

**IN THE MATTER OF THE COMPANIES ACT (CAP 486)**

**R U L I N G**

1. Before me is a Motion on Notice dated 16<sup>th</sup> April, 2012 brought under Rules 3 and 7 of the companies winding up Rules and the inherent power of this court. The grounds in support are that the award made by the Arbitrator which was the foundation of the claim herein has since been set aside in its entirety in High Court Misc. 400 of 2011, that the company is therefore not indebted to the Petitioner, that therefore the Winding Up Cause 4 of 2011 pendency of the petition herein is an abuse of the court process. Linda Kaai-Kiriko swore an Affidavit in support of the motion. Mr. Ngatia appearing for the applicant submitted that the proceedings herein were seeking to enforce the Award of the Arbitrator published on 2<sup>nd</sup> March, 2011, that since there is no award in force the proceedings seeking to enforce that award must come to an end, that there can be no proceedings going contrary to the judgment made on 1<sup>st</sup> December, 2011, that commencement of an appeal is not a stay. He urged that in the circumstances the application should be allowed.

2. The Respondent did not file any Replying Affidavit. Mr. Mshweshwe, learned Counsel for the Respondent was allowed to respond on points of law. He submitted that these proceedings are intertwined with HC Misc No. 400 of 2011 in which a judgment was delivered setting aside the Arbitrators Award, that there was an appeal pending against the said judgment, that if the appeal succeeds the parties will revert to the position they were in when the current proceedings were commenced to enforce the award. In his view therefore, the order that should commend itself to this court should be to stay these proceedings awaiting the determination of that appeal and that in any event the company and not shown what prejudice it is suffering with the continued existence of these proceedings. Counsel urged that the application be dismissed.

3. I have carefully considered the Affidavit on record, the exhibits relied on and the able submissions of the respective Counsel.

4. These proceedings were commenced by a winding-up petition on 29<sup>th</sup> March, 2011. The Petitioner pleaded therein that the Applicant's debt arose out of an arbitral award of Kshs.541,005,922/81 together with interest of 16% from 8<sup>th</sup> May, 2009 until payment in full, that as a result of that award the applicant had been served with a notice of settlement in accordance with Section 220(a) of the Company's Act as it was unable to pay its debts. The petitioner prayed that the applicant be wound up.

5. Subsequently, the Applicant took out proceedings in H.C Misc Cause No. 400 of 2011 seeking to set aside the subject Arbitral Award. In a well considered Ruling delivered on 1<sup>st</sup> December, 2011, the Hon. G. Kimondo J allowed the said application and set aside the said Arbitral Award. It is the setting aside of the said arbitral award that provoked the application before me. I have listened to and considered the opposing arguments of Counsel.

6. As at the time the matter came before me, there was no award in existence. There is no debt in existence in respect of which the winding up petition herein is anchored on. It is admitted that an appeal has been preferred against the ruling setting aside the petition but there is no stay in force. That being the case the petition cannot continue existing in a vacuum. The substratum for its existence has dissipated. Likewise the petition must dissipate.

7. The Respondent has urged that the petition should not be dismissed but that rather that the court should stay the proceedings pending the hearing of the said appeal against the ruling made in H.C Misc Cause No. 400 of 2011 aforesaid. I do not think so. There is no application for stay before this court to consider staying the proceedings. In any event, making such an order will be speculative and presumptive of that appeal. I believe that, the continued existence of any litigation against a party is enough prejudice one does not need to show other prejudice than the mere existence of such a litigation. It is well known by all and sundry what anxiety litigation can cause a litigant. I hold that the mere existence of such litigation with its unknown dire consequences on a party is enough prejudice. In a pending litigation, prejudice is a matter of course.

8. The petition filed herein on 29<sup>th</sup> March, 2011 cannot exist in vacuum. However, since the same has not been heard on merit the order that commends itself to this court is not to dismiss the same but to strike out the same. Accordingly, the Notice of Motion dated 16<sup>th</sup> April, 2012 is allowed on the following terms. The petition dated 29<sup>th</sup> March, 2011 be and is hereby struck out with costs to the company.

9. The orders made herein shall apply to H.C Misc Cause No. 604 of 2011 **Nyutu Agrovat Ltd –vs- Airtel Networks Kenya Ltd** formerly Known as **Celtel Kenya Ltd**.

It is so ordered.

Dated and delivered at Nairobi this 28<sup>th</sup> day of September, 2012.

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**A. MABEYA**

**JUDGE**