



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI ( MILIMANI LAW COURTS**

**WINDING UP CAUSE 15 & 16 OF 2011**

**IN THE MATTER OF THE COMPANIES ACT,**

**CAP 486 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF P.J DAVE FLOWERS LIMITED**

**RULING**

1. Winding up Cause Nos.14, 15 and 16 all of 2011 were commenced by separate Petitions dated 3<sup>rd</sup> June, 2011. In the said Petitions, **DHC GLOBAZ FORWARDING (K) LIMITED** (hereinafter “**the Petitioner**”) contended that **P.J. DAVE FLOWERS LTD** (“**the 1<sup>st</sup> Company**”), **ISINYA ROSES LTD** (“**the 2<sup>nd</sup> Company**”) and **PJ DAVE (EPZ) LTD** (the “**3<sup>rd</sup> Company**”) were unable to pay their respective debts as follows:-

- (i) In W.C No. 14 – US\$100,597.95 as at 26/01/2011.
- (ii) In W.C No. 15 – US\$85,809.78 as at 21/12/2010.
- (iii) In W.C No. 16 – US\$157,505.55 as at 26/01/2011.

2. All the Petitions were filed on the 6<sup>th</sup> June, 2011. Mr. John Cokayne swore the Verifying Affidavits on 3<sup>rd</sup> June, 2011 in respect of all those Petitions and all of them were received in court on 6<sup>th</sup> June, 2011, the same day the Petitions were filed. The Petitioner contended in the Petitions that the sums claimed were in respect of freight and handling services rendered by the Petitioner to the companies. The Petitioner sought the winding up of the three (3) companies. The three Petitions were consolidated under **W.C No. 16 of 2011** as the head file.

3. On 5<sup>th</sup> July, 2011, companies took out summons in chambers under Section 3A of the Civil Procedure Act, Order 40 of the Civil Procedure Rules, Section 219, 220 and 221 of the Companies Act and Rules 5 (2), 6 and 203 of the Companies Winding Up Rules seeking an order to restrain the Petition from being advertised and for the striking out of the Petition for being scandalous, frivolous, vexatious and otherwise an abuse of the court process. The grounds upon which the application was brought were set out in the body of the summons and in the Affidavits of Pravin Jaychandra Dave and Kiarie Ngacha Wanarua sworn on 5<sup>th</sup> July, 2011 and 1<sup>st</sup> September, 2011, respectively.

4. Briefly, the Companies contended that they were solvent and able to pay legitimate debts, that they

were not indebted to the Petitioner, that the amounts claimed by the Petitioner were disputed and that these proceedings were commenced mala fides and were meant to put undue pressure on the companies to pay the disputed amounts.

5. In the Affidavits, it was sworn for the Companies that the companies deal with growing and exporting of fresh flowers and horticultural produce to Europe, under the blocked space Agreement that they contracted the services of the Petitioner to uplift the fresh produce to Europe, that between February and April 2010, the Petitioner breached its contract with the Companies by failing to uplift 35 tons of flowers whereby the Companies suffered loss and damage, that it was agreed that the Petitioner would pay the Companies a sum of Euros 150,000/- as compensation for the said failure, that the Petitioner unilaterally transferred its services under the Blocked Space Agreement with the Companies to Flowerwings Kenya Ltd which offered the companies worse off services than the Petitioner leading to more losses to the companies. That the companies were at all times ready and willing to pay any and all amounts properly due after deducting the agreed compensation of Euros 150,000, that instead the companies received demands from the Petitioner to pay US\$157,505.55, US\$100,597/95 and US\$85,809/78, respectively to which the companies responded by counterclaiming a sum of Euros 351,408 for loss and damage suffered by the companies as a result of the Petitioner's actions, that on analyzing the invoices by the Petitioner, Mr. Kiarie Wanarua had established overcharge of US\$40,198/48 in one of the claims, that the alleged debt was incorrect and inaccurate, that the Petitioner had filed on 17<sup>th</sup> February, 2011 **HCCC Nos. 47, 48 and 49 of 2011 DHL Global Forwarding Ltd –vs- the 3 Companies** to restrain the companies from commencing winding up proceedings on their claim, that the Petitioner was abusing the court process for restraining the companies first then proceeding to commence winding up proceedings against them, the question is whether the amount demanded is due and if so, how much?

6. Mr. Nagpal, learned Counsel for the companies submitted that the debt was disputed, that the Petition was defective in that it breached Rule 25 of the Winding Up rules in that the Verifying Affidavit was filed contemporaneous with the Petition, that the Petitioner had not controverted the Affidavit of Kiarie Ngacha Wanarua. Counsel relied, inter alia, on the cases of **Paopo Muri –vs- Gian Batista Murri & Anor CA No.59 of 1999 (UR)**, **In Re Kanini Farm Ltd W.U No. 19 of 1998 (UR)** and **RE: African Safari Club Ltd WU No. 1 of 2005 (UR)**. Counsel urged that the application be allowed.

7. In opposition, the Petitioner filed a Replying Affidavit of John Cokayne sworn on 18<sup>th</sup> July, 2011 and written submissions dated 16<sup>th</sup> April, 2012. The Petitioner contended that there was a contract between the parties for delivery of the Companies' Perishable goods to Europe, that as at 14<sup>th</sup> April, 2010 the Companies owed the Petitioner US\$85,809/78, 100,597/95 and 157,505/55, respectively. The Defendant produced a schedule of invoices in respect of the said amounts, that on failing to settle the amounts the Petitioner served upon the companies notices under Section 220 of the Companies Act, that the offer to settle the Companies claim of US\$248,011 at US\$150,000 as compensation was made in good faith and without prejudice, that the companies served the Petitioner with notice under Section 220 of the Companies Act for US\$210,844.80, that this provoked the filing of HCCC Nos. 47, 48 and 49 of 2011 seeking restraining orders against the Companies from instituting winding up proceedings against the Petitioner, that in the circumstances, this application had been brought in bad faith.

8. Mr. Njeru, learned Counsel for the Petitioner submitted at length on his client's position, that the debt was clear and undisputed, that the debts herein are not related to HCCC Nos. 47, 48 and 49 of 2011 in that whilst the disputes arise from the same contract they relate to different periods, that the issue of disputed debt arose 5 months after the demand, that a counterclaim arising out of a different transaction cannot amount to a dispute. He admitted that the Verifying Affidavit to the Petitioner was filed on the same day which was not fatal, that what rule 25 of the Winding up bars is the filing of the Verifying Affidavit after four (4) days of the filing of the Petition, he relied on Article 159(2) of the constitution on undue technicalities as well as rule 202 of the winding Up Rules. Counsel cited the cases of **Eric Cairns –vs- International Homes Ltd & Anor NBI HC W.U. Cause No. 34 of 2004** on the proposition that it is only at the trial that it can be established if the debt is or is not disputed. Counsel urged that the application be dismissed.

9. I have carefully considered the Affidavits on record, the submissions of Counsel and the authorities

relied on. The companies have sought an injunctive order and an order to strike out the Petitions for being scandalous, vexatious and otherwise an abuse of the process of the court. I am alive to the principles set out in **in Giella –vs- Cassman Brown Case 1963 EA** as to the granting of injunctions. I am also aware of the principles set out in the case of **D.T Dobie –vs- Muchina (1982) KLR 1** as to striking out of pleadings.

10. I propose to start with the non-compliance of the Petition with Rule 25 of the Companies (Winding-up) Rules. That rule provides:-

***“25. Every Petition shall be verified by an affidavit, which shall be sworn by the Petitioner, or by one of the Petitioners if more than one, or, where the Petition is presented by a corporation, by a director, secretary or other principal officer thereof, and shall be sworn and filed within four days after the Petition is presented, and such affidavit shall be prima facie evidence of the contents of the Petition”***  
***(Emphasis mine)***

11. That provision is in mandatory terms. The Verifying Affidavit should be filed within **four (4) days after** the Petition has been filed. In the case before me, the Verifying Affidavits would seem to have been filed simultaneously with the Petitions. Both are dated the same day (3<sup>rd</sup> June, 2011) and filed on the same day (6<sup>th</sup> June, 2011). **Mr. Nagpal relied on the cases of Re Kanini Farm Ltd (Supra), Guilders International Bank Ltd (Supra) and Re Mode (1996) Security Ltd (UR) Re Kanini Farm Ltd** is inapplicable in that case, addition to the Verifying Affidavit being sworn before the filing of the Petition, the Petition was advertised before being served contrary to rule 23 of the Winding Up Rules. In **Re Guilders International Bank** the Verifying Affidavit was “**post dated**” whilst the Affidavit sought to cure the anomaly was filed out of the four (4) days set out in Rule 25 of the winding up Rules.

12. My view is, rule 25 of the Winding Up Rules does not bar the filing of the Affidavit on the same day of filing the Petition. At least that rule does not say so. It only expressly directs that the Verifying Affidavit shall be **sworn and filed** within four days **after the Petition has been presented**. To my mind, therefore the date of the swearing and filing of the Verifying Affidavit should not pre-date the date of presentation of the Petition. Therefore, if the date of the verifying Affidavit is the same date as the date of the filing of the Petition, I see nothing wrong with that. What is barred is the swearing and filing of the Verifying Affidavit before the Petition is presented or outside four (4) days after the Petition had been presented.

13. The Verifying Affidavits in this case was sworn before the Petition was presented. Although it was filed with or shortly after the Petition was presented, that Verifying Affidavit fell foul of Rule 25. As I have stated the rule is in mandatory terms. The Verifying Affidavit should be sworn and filed after the Petition has been presented. It can be sworn and filed on the same day the Petition is presented. Since the Verifying Affidavit breached Rule 25 of the rules, what is the effect on the Petition? Mr. Njeru for the Petitioner urged that that was curable under Article 159(2) of the Constitution of Kenya and rule 202 of the Winding Up Rules.

14. In the case of **ONECELL tracking Limited Winding Up cause No. 41 of 2010 (UR)** while considering a matter where the Verifying Affidavit was sworn before the date of the Petition but both filed simultaneously, I held that:-

***“A close reading of Rule 25 of the Winding up Rules will show for what purpose the Verifying Affidavit is:-***

***‘... And such Affidavit shall be prima facie evidence of the contents of the Petition.’***

***The purpose therefore of a Verifying Affidavit in winding up matters is to be prima facie evidence of the contents of the Petition and not the evidence itself of those contents. The reason for this is because of what Form 11 requires the Verifying Affidavit to be, that is, to state the correctness of the contents of the Petition. Period, nothing more. That being the case, I hold the view that if the Verifying Affidavit is found to be defective like I have found in this case, it does not go to the root of the Petition***

*itself. There is saving provisions under the rules themselves. These are Rules 201 and 202(1) of the Winding Up Rules. Rule 201 gives the Court discretion to enlarge the time fixed by the rules whilst Rule 202 (1) provides:-*

.....  
.....

***In my view, it has not been shown that the Applicant has suffered any prejudice or substantial injustice or at all as a result of the defectiveness of the Verifying Affidavit in this Petition.”***

In that case, I struck out the offending Verifying Affidavit and extended the time for the filing of a proper Verifying Affidavit within 14 days. I am still of the same persuasion here. I see no prejudice that has been suffered by the Companies and I therefore refuse to strike out the Petition on that ground. I will however strike out the Verifying Affidavit and grant the Petitioner leave of 7 days to file compliant Verifying Affidavits.

15. This brings me to the other issue of contention, that the debt is disputed and that the Petition is therefore scandalous is mala fide and an abuse of the court process. In **Re Standard Ltd Ex parte Tricom Paper International BV (2002) 2 KLR 643**, the court held that, the disputed debt must be predicated on substantial grounds and not by the mere fact of an affirmation by the creditor and a denial by the debtor. In **Eric Cairns Hanna and International Homes Ltd & Other W.U. No. 34 of 2004 (UR)** the court held that motive of filing a Petition is irrelevant to the winding up proceedings, if the Petitioner otherwise has a legitimate ground. Further, in that case the court, following the holding in the Court of Appeal case of **Jitendra Bramhard –vs- Dynamics Engineering Ltd 91982 – 88) I KAR 1001** allowed the Petition to proceed to trial so that the dispute between the parties would be resolved at that stage not affidavit level.

16. In **Re Bentley Travel Ltd NRB W-up No. 5 of 1999 UR** the court held that the fact that a company owes another company or an individual money does not in itself lead to winding up proceedings as the Companies Act should not be used to blackmail companies through the threat of winding up proceedings every time a company disagrees with a would be creditor or every time a company denies indebtedness. Winding up Petitions should be preferred only where there is a clear evidence that a company is unable to pay its debts and the onus is on the Petitioner to show that the debt is due and the company is unable to settle the debt that has become due.

17. In **Re Lypne Investments Ltd (1972) 2 All ER 385**, the court held at page 388:-

***“The companies’ court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the company’s head while that litigation is fought.***

.....

***Again, the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that (the company) has within the meaning of Section 223(a) “neglected” to pay the sum required by the statutory notice ....***

***In the context of a notice requiring a person to do some act, I do not see how it can be said that the person “neglects” to do that act if the reason for not doing it is a genuine and strenuous contention, based on substantial grounds, that the person is not liable to do the act at all..... but a challenge to liability is a challenge to the foundation on which any contention of “neglect” in relation to an obligation must rest.” (Emphasis mine)***

18. Finally, in **Re Mann –vs- Goldstein (1968) 2 ALL ER 769 at page 773**, the Court held:-

**“ .....(iii) Where the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore ignore) and the company is solvent the court will restrain the prosecution of the Petition to wind up the company. As Sir Richard Melins V.C said in Cadiz Waterworks Co. –v-s Barnett, of a winding up application,**

**‘It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and a disputed debt.’ (Emphasis mine)**

19. From the foregoing, it is clear that where there is a genuine disputed debt on substantial grounds a Petition will be struck out. Such a dispute should not be frivolous or light, it must be based on sound grounds. The dispute should also not be raised in order to defeat a genuine legal process that is the winding up. It is also clear that where there is solvency and a genuine disputed debt, a Petition for winding up will not stand.

20. In the case before me, it is not disputed that there was a Blocked Space Agreement, by which the Petitioner would block a specified space in airlines for the shipment of the companies’ fresh and perishable products to Europe. It is also not in dispute that the Petitioner did raise several invoices in respect of which the amount of the debt arose. The companies have contended that in or about 2010 because of the Petitioner’s actions which were in breach of the aforesaid Blocked Space Agreement, there was failure to ship certain of the companies’ merchandise, that because of the Petitioners poor handling and storage facilities the companies did suffer huge losses for which the companies raised claims. It was agreed between the parties that the Petitioner would compensate the companies to the tune of Euros 150,000 in respect of future business, that the Petitioner shortly thereafter transferred its undertakings under the Blocked Space Agreement to a new entity known as Flowerwing Kenya Ltd. It is also not disputed that the Petitioner did rightly issue statutory demands for the amounts claimed. It is on issuing the said demands that the following happened:-

- (i) The companies raised a claim for US\$351,408/- against the Petitioners.
- (ii) The Petitioner rushed to court in HCCC Nos. 47, 48 and 49 of 2011 and obtained injunctive orders restraining the companies from seeking to wind up the Petitioner for the aforesaid claims.
- (iii) The companies have in those suits counterclaimed for the amounts the companies had demanded from the Petitioner.
- (iv) There were statutory demands under Section 220 of the Companies Act both by the Petitioner and the companies against each other.

21. After considering the applications for injunction in HCCC Nos.47, 48 and 49 of 2011 aforesaid granting the restraining orders sought by the Petitioner, the Hon. Okwengu ( as she then was) held:-

***“The transactions and exchange of correspondences between the parties do not reveal any difficulty on the part of the applicant or vice versa the respondent in paying its debts. Prima facie the parties have been having a good working relationship. This is evidenced from the fact that the parties were able to discuss and agree on a compensation for the losses suffered by the respondent. The dispute appears to have arisen regarding the payment of the agreed compensation. There is a dispute as to whether the payment was subject to some conditions. There is also a dispute as to whether if there were conditions the applicant released the respondent from the conditions by transferring its perishable business to another company.*”**

**12. While these issues will be for determination during the trial, I am satisfied that there is an issue as to whether the notices under Section 220 of the Companies Act served by the respondent upon the applicant and vice versa were proper notices under the Section or whether they were intended to arm twist the respective parties to make payment.**

**13. It is trite law that winding up proceedings cannot be used for the purpose of deciding a disputed debt” (Emphasis mine)**

22. It is clear that her Ladyship was referring to the statutory notices issued by the Companies against the Petitioner herein and vice versa. Some of those Notices are the basis on which these proceedings were commenced. Her Ladyship found in that ruling that there was something that needed to be interrogated about those notices at the trial thereby injuncting the companies. In her Ladyship’s view, the notice by the companies was intertwined with the earlier notice by the Petitioner herein.

23. I have perused the Affidavits on record. I have seen the lengthy Replying Affidavits of Kiarie Ngacha Wanarua sworn on 1<sup>st</sup> September, 2011. The same makes various contentions on how the Petitioner’s claim is disputed, he exhibited his workings on the Petitioner’s claims and he stated on oath that there was an overcharge by the Petitioner on its invoices. Mr. Kiarie asserted that not only was the Petitioner’s debt seriously disputed but that the companies had a genuine claim against the Petitioner. I have also noted the companies’ assertion that they are solvent and can pay all their genuine debts.

24. Applying the dicta of Sir Richard Melins in the case of **Cadiz Waterworks Company –vs- Barnett** that solvency exists and the debt is disputed, the winding up proceedings herein are not the proper remedy to be applied for in the circumstances of this case.

25. Having in mind that the long positive averments of Kiarie Ngacha Wanarua were never controverted, I am satisfied that although the claims arose at different periods, they relate to the very same transaction of the Blocked Space Agreement. I have also examined the Plaints, Defences and counterclaim and Reply to Defences and Defence to counterclaims in HCCC Nos. 47, 48 and 49 of 2011, respectively. I am of the view that the issues raised in the counterclaim in the said proceedings are the very same issues the companies have raised in these proceedings. It is obvious that the two are intertwined.

26. In view thereof, I am satisfied that the debt is properly disputed by the companies.

27. Accordingly, I believe that the Petitions were brought with the Intention of unduly pressurizing the companies into paying the debt which was clearly disputed. Accordingly, I am of the view that the Petition is an abuse of the process of the court. I therefore allow the application and strike out the Petition with costs thereof to the companies. This order will apply to winding up Cause Nos. 14 and 15 of 2011, respectively.

DATED and DELIVERED at Nairobi this 12<sup>th</sup> day of October, 2011.

.....

**A. MABEYA**

**JUDGE**