



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Winding Up Cause 17 of 2008

IN THE MATTER OF: SUMMIR ENTERPRISES LIMITED

AND

IN THE MATTER OF: THE COMPANIES ACT

RULING

1. **Kenya Stationers Limited** (herein called the petitioner) filed this petition seeking to wind up the company by the name **Kenya Summir Enterprises Limited** (hereinafter called the company) on the grounds that the company is indebted to the petitioner in the sum of Ksh.2.096,356.20/- being the sum due from the company for the goods supplied to the company by the petitioner. The petitioner issued a demand for the amount owing but the company failed to pay.
2. The petition is opposed and a certificate of compliance was issued by the Deputy Registrar in accordance with rule 28 of the Companies Rules. The company filed the chamber summons dated 6th July 2009 seeking for orders that the petition be struck out. This application is premised on the grounds that the verifying affidavit has not complied with the mandatory rules of the law which require the affidavit be filled four days after the petition. The petition was filed on 28th July 2008, and the verifying affidavit was filed on 29th July 2008.

3. The petition was also challenged because it was not sealed with the company seal as provided for under rule 10 of the Companies Winding up Rules. The third issue taken out with the petition, is that the debt is contested and there is ample jurisprudence that winding up petitions cannot be brought in respect of a contested debt. The replying affidavit raises contentious issues regarding the debt. In response to the defences raised in the replying affidavits by the company, the petitioner offered to make some waiver of some charges by way of interest which lends credence to the contention by the company that the debt is contested.

4. On the part of the petitioner, it was argued that the petition is properly before the court. The verifying affidavit was filed on 29th July 2008 in accordance with the rules. Counsel made reference to the case of **Uganda Law Society vs. The Attorney General 1 EA 301** where the court of appeal of Uganda held that:-

“All things are presumed to have been legitimately done until the contrary is proved.”

5. Regarding the sealing of the petition, counsel for the petitioner submitted that the petition was duly sealed by the deputy registrar. The seal referred to under rule 2 of the Winding up Rules, is the Court seal. Regarding the debt the petitioner maintains that the company owes a total of Ksh.3,290,089,82 however due to a technical error the statement which was prepared showed a balance of Ksh.2,096,356.20. The petitioner contends that they were prepared to go by the demand letter and forego certain claims such as:

- i. Bill extension charges;
- ii. Late payment charges;
- iii. Interest on the bill extension charges (the total of 1, 2 and 3 is Ksh.915,421.42); and

iv. The claim for ksh.21,290.70.

6. The petitioner maintains that although the company claims to have paid certain cheques, those cheques which were issued bounced and at one time the company admitted liability. Thus the petitioner has been able to establish that the debt exists and the company owes the petitioner a sum of Ksh.1.058,844.10. Counsel put forward the authority **in the matter of Echuka Investments Ltd versus The Companies Act, Winding Up Cause Number 29 of 1999**, the Court at page 2 held that:-

“. . . Where a company owes the creditor a debt which entitled it to a winding up order and only the precise amount of debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely”

According to the provisions of section 220 of the Companies Act, a demand letter was duly issued for the debt which is in excess of one thousand shillings. The same was not paid within three weeks and the petitioner was justified to petition for the winding up of the company.

7. The above is the summary of the salient issues raised in this application and the rival submissions. The matter to consider at this interlocutory stage is whether to strike the petition based on the grounds urged by the company. It is contended that the verifying affidavit was filed outside the statutory period contrary to the provisions of rule 25 of the Winding up Rules. According to that rule. A verifying affidavit ought to have been sworn and filed within four days after the petition was present in court. This petition was filed on 28th July 2008, the verifying affidavit was sworn on the same day but was filed the following day that is on 29th July 2008. This was not in accordance with the rules. If it was done according to the rules, the affidavit would have been filed on the 1st August 2008.

8. The second issues was regarding the petition which according to

counsel ought to have been sealed with the company seal as provided for under rule 10 of the Winding Up Rules. In my humble view nothing turns on this issue, as I am prepared to go by the argument by counsel for the petitioner that the seal referred to under rule 10 is the court seal which is normally affixed by the deputy registrar.

9. I will now turn to the third issue whether the petition is oppressive because the debt is contested. Going by the replying affidavit sworn by Hiten **Lalit Kumar** the managing director of the company on 13th March 2009, and the annexed documents, another affidavit sworn on 6th July 2009 in support of this application it is evident that the debt by the petitioner is contested. In reply the petitioner has substantially altered the sum demanded and claimed in the petition. According to the petitioner's counsel the sum owing is **1.058,844/-** which is at variance with the original sum of Ksh **2,096,356.20**.

10. Going by the established principles on when to wind up a company, I wish to borrow the persuasive words by **Meggary J**, in **RE LYMPNE INVESTMENTS LTD [1972]2 ALL ER 385, at page 388** which words were also adopted by **Ringera J** in the matter of **Standard Limited Winding Up Cause No.14 of 2002, Milimani Commercial Courts** as follows:

“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 settled in ordinary litigation or to be kept in suspense over the company's lead while that litigation is fought out. Further, Mann V Goldstein provides authority for saying that when a petition is based on a debt

which is disputed on substantial grounds, the petitioner is not a 'creditor' within section 224 (1) of the Companies act who has the locus standi requisite for the presentation of the petition, even if the company is infact insolvent. 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 all. If there is liability; a failure to discharge that liability may well be 'neglect' whether it is due to inadvertence or obstinacy or dilatoriness; but a challenge to liability is a challenge to the foundation on which any contention of 'neglect' in relation to an obligation must rest"

11. From the foregoing analysis, it is clear that this is not a suitable case for winding up a company as the petitioner's claim is substantially disputed. Accordingly the petitioner should pursue other remedies other than the winding up. This coupled with the fact that the verifying affidavit was not filed according to the provisions of the rules this petition should be struck out on the grounds that it is incurably defective and incompetent. Costs to the company.

RULING READ AND SIGNED ON 5TH FEBRUARY 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**