



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Cause 38 of 2000**

In the matter of MATIC GENERAL CONTRACTORS LIMITED

AND

In the matter of COMPANIES ACT

JUDGMENT

1. The Petitioner Guilders International Bank Ltd petitioned for the winding up of Matic General Contractors Limited (hereinafter referred to as the Company). This petition is predicated on the grounds that the company is indebted to the Petitioner in the sum of Kshs. 37,883,507.10 being the amount of money lent by the Petitioner to the Company together with accrued interest thereon at the rate of 31% per a. from 1st February 2000 until payment in full. On 20th April 2000, the Petitioner served the company with a demand letter calling upon the company to pay the sum of ksh. 37883,507.10 which was demanded. The Petitioner also indicated that failure by the Company to pay the debt demanded, a winding up petition as provided for under **Section 220** of the **Companies Act** will be filed.

2. The Company did not honor the demand and the Petitioner petitioned seeking for an order that the company be wound up under

the provisions of the Companies Act. The company objected to this application and filed a Notice of Motion under **Section 220** of the **Companies Act** as well as **Rule 5(2), (6)** of the **Winding up Rules**.

The Company sought for orders that the petition be struck out on the grounds that the statutory notice was not served upon the Company. A ruling by **Ochie'ng, J** delivered on 16th March 2007 that application was dismissed for lacking in merit.

3. The petition proceeded for hearing before and evidence in support of the petition was given by Daniel **Gatimu Karonji** who used work within the credit Department of the Petitioner. The Petitioner was taken over by Guilders Bank. He testified that the company applied for an overdraft facility of Kshs.2,550,000/- on 14th June 1994 which was granted against a security of a fixed deposit of Kshs. 3 million which was in the account of the company. The Company again applied for another facility of Kshs. 5 million on 3rd November 1994 as security for that facility, the Company executed debenture on motor vehicle registration Number KAB 502W and KAC 584C. A debenture was created and registered. This witness produced the statements of account that shows how the company utilized the facility. The bundle of documents also produced by this witness contains the letter of offer for both facilities, the debenture that was created over the two motor vehicles. According to this witness, the company failed to pay the debt according to the terms and conditions of the borrowing demand letter was sent and no payment is forthcoming thus the petition was filed

seeking the company to be wound up.

4. The Company opposed the petition; evidence was lead by Stephen Kinyanjui Mburu the General Manager of the company. He relied on an earlier affidavit sworn on 14th December 2000. He admitted that the company borrowed a sum of Kshs. 2,550,000. Against a fixed deposit of Kshs. 3 million. Although it was admitted the company borrowed a further sum of Kshs. 5 million which was secured by two motor vehicles this witness denied that the sum of Kshs. 5 million was disbursed to the company. The company therefore denied owing any money to the Petitioner and urged the court to dismiss the Petition.

5. Counsel for the Petitioner filed written submissions and cited several authorities in support of the Petitioner's case. The issue to determine is whether the company should be wound up pursuant to the provisions of **Section 220** of the **Companies Act** which provides:

(a)...

(b)...

(c) "A company shall be deemed to be unable to pay its debts, 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"

The company denied the existence of the debt.

6. On the part of the Petitioner, evidence was given and documents were produced to show how the Company applied for the loan. Statements were produced showing how the Company operated the loan accounts. During cross-examination the witness for the

company admitted that he received statements from the Petitioner and he used to complain about the debits on the company account. However he did not produce any document to support this contention. The company claimed to have filed another suit HCCC No. 2047 of 1995 (Nairobi Central Registry Matic General Contractors Limited vs Guilders International Limited.) in that case the Company sought an injunction to restrain the Petitioner from repossessing the two motors vehicles which were held as security and by the order of the court, the company assets were preserved until further orders of the court. However no evidence was brought to this court to show that the vehicles were not preserved as per the order of the court. According to the Petitioner's counsel's submissions, the Petitioner was unable to realize the security to recover the debt owed and that is when the Company was served with a winding up notice under **Section 220** of the **Companies Act**.

7. Although the Company denied having taken a loan of Kshs. 5 million, a closer examination of the documents on record especially the affidavit filed by the company Managing Director in HCCC No. 2047 of 1995, the company admitted having taken a loan of 5 million. This is also supported by the statement of accounts. The company also executed a debenture which was produced in evidence. The statements of accounts also show the movement of the funds in the account which was operated by the company.

8. Although the company disputed this debt there were no substantive grounds advanced to challenge the debt this is as it was

held in the case of **Reglobal Tours and Travels Limited East Africa Law Report [2001] 1EA 195** where Ringera J, (as he then was) while relying on the case of *Re Lymphne Investments Ltd* Megarry J, a most respected Chancery Judge, observed at 389:

“Mann v Goldstein cited with approval in the New Zealand Court of Appeal in Betaman Television Ltd v Coleridge Finance Co Ltd 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, 1948 who has the locus standi requisite for the presentation of the petition, even if the company is in fact solvent. Again the existence of a dispute on substantial grounds as to the existence of any debt defeats the contention that [a company] has within the meaning of section 223(a) neglected to pay the sum required by the statutory notice”.

It is common ground that the 1948 English Companies Act is equivalent to our Companies Act thus the above authority was held to be of persuasive nature.

9. In another similar matter decided by **Onyango Otieno J**, (as he then was) in the case of **United Touring Company Ltd vs. Companies Act**, a decision as to whether a petition should be sustained against a company that had disputed a debt as to the amount owed, will not provide a sufficient answer to a winding up petition against an insolvent company. Thus the court followed the case of **Re Tweeds Garages Ltd (1962) 1 ALL ER121**. In that case it was held:

“Where there was no doubt that the Petitioners were creditors for a sum which would otherwise entitle them to a winding up order, a dispute as to the precise amount owed was not a sufficient answer to the petition; accordingly, a winding order would be made.”

In this case, under Section 220 (a) of the Companies Act (Cap 486 Laws of Kenya) a sum which would entitle a creditor to petition is Kshs.1000/- mid above. The Applicant is by the letters I have referred to hereinabove admitting the outstanding debt due to the Petitioner to be Kshs.4,324,425,00. This was admitted in a letter dated 27th September 2000. It has not been paid and notwithstanding the statutory notice it is still

not paid.

10. In this matter the company denied the existence of the debt, this denial was not substantiated with any cogent evidence. The Company admitted in some documents that they received a sum of Kshs. 5 million as a loan from the Petitioner and two motor vehicles were held as security. It was on that basis the company obtained an order of injunction preserving those motor vehicles until that case was determined. No evidence was tendered to show how those vehicles which were preserved by court were repossessed and by who or how they were disposed of. This defence does not constitute a substantial objection. I have no difficulty to go by the evidence by the Petitioner that the company should be wound up as per the notice which was served.

11. Accordingly I allow the petition and order the company **Matic General Contractors Ltd** to be wound up. This order shall be served upon the official receiver of the Republic of Kenya to wind up the company and to file a report within 12 months. Costs of this petition to the Petitioner.

JUDGMENT READ AND SIGNED ON 17TH SEPTEMBER 2010 AT NAIROBI.

**M. K. KOOME
JUDGE**