



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION, MILIMANI**  
**WINDING UP CAUSE NO 3. OF 2010**

EQUITY BANK LTD.....PETITIONER

VERSUS

DIMKEN (K) LTD.....RESPONDENT/COMPANY

**JUDGMENT**

Before the Court is a petition by which the Petitioner seeks a Winding Up order in respect of the Respondent Company. The petition is dated 8<sup>th</sup> February, 2010 and the Petitioner specifically seeks the following reliefs –

1. **THAT the company DIMKEN (K) Ltd be wound up by the court under section 219 (e) of the Companies Act**
2. **THAT out of the assets of the Company the Petitioner be paid on priority its debt of Kshs 197,037,156.30 together with interest thereon.**
3. **THAT such other order may be made in the premises as the court shall deem fit.**
4. **THAT the costs of the Petitioner be awarded to the Petitioner out of the assets of the Company on priority basis.**

The Petitioner's claim is based on some Performance guarantees/bonds and advanced payment guarantees entered into between the Ministry of Works, the Petitioner and the Respondent. In a nutshell, the Petitioner granted Performance guarantees/bonds and an advanced payment guarantees in favour of the Permanent Secretary, Ministry of Roads and Public Works, in respect of contractual works undertaken by the Respondent. The said Performance guarantees/bonds and advanced payment guarantees were as follows –

- a) **Advanced payment guarantee of Kshs 144,412,535 dated 12<sup>th</sup> April, 2006 in favour of the Ministry of Works.**
- b) **Advanced payment guarantee of Kshs 108,309,400 dated 12<sup>th</sup> April, 2006 in favour of the Ministry of Public Works.**

**c) Performance Bond/guarantee of Kshs 19,700,478 dated 13<sup>th</sup> April, 2006 in favour of the Ministry of Public Works, and**

**d) Performance Bonds/guarantees of Kshs 19,700,000 dated 12<sup>th</sup> April, 2006 in favour of the Ministry of Works.**

The guarantees/bonds were issued pursuant to the Respondent's application dated 11<sup>th</sup> April, 2006, to which a letter of offer was issued and accepted by the Respondent on 13<sup>th</sup> April 2006.

Pursuant to these guarantees/bonds, the Petitioner paid the sum involved to the Permanent Secretary, Ministry of Roads and Public Works, and thereafter sought reimbursement from the Respondent. Unfortunately, the Respondent failed to make good the reimbursement, thereby precipitating this petition.

The Petition is supported by Benard Ndirangu Githinji, Charles Itangi Mbugua and Beatrice Wanjiru Wageche who were the Plaintiffs in Milimani High Court Civil Case No 625 of 2009 in which judgment was entered in their favour in the sum of Kshs 2,199,080.00 with interest from 13<sup>th</sup> September, 2009 until payment in full. A notice of intended execution was issued but the Plaintiffs were unable to trace the Defendant's assets and the said sum of Kshs 2,119,080.00 plus interest is still due and owing. Costs were thereafter assessed at Kshs 137,427.48. The Plaintiffs contend that it is just and equitable that the orders sought by the Petitioner herein be addressed, and the Plaintiffs claim be considered in the proceedings.

The Petition is further supported by David Gitonga Amuru, who filed High Court Civil Case No 366 of 2008 at Milimani Commercial Court against the Respondent Company. A decree and Certificate of Costs were issued on 11<sup>th</sup> September, 2008. The Decree provided that **"judgment be and is hereby entered against the defendant in favour of the Plaintiff for Kshs 3,418,195.00 together with interest and costs."** The certificate of costs certified the same at Kshs 136,002.00, and warrants of attachment and sale of property in execution of the said decree were issued to Daystar Auctioneers.

The debtor paid Kshs 100,000 in cash on 16<sup>th</sup> October, 2008 in part settlement of the decree to serve. The debtor also gave cheques Nos 61 dated 30<sup>th</sup> October, 2008; 62 dated 30<sup>th</sup> November, 2008; 63 dated 30<sup>th</sup> December, 2008; 64 dated 30<sup>th</sup> January, 2009; 65 dated 30<sup>th</sup> February, 2009; 66 dated 30<sup>th</sup> March, 2009; and 67 dated 30<sup>th</sup> April, 2009, each for sum of Kshs 500,000 in an attempt to settle the debt. The first two cheques were returned by its Bank unpaid on the instructions of the Respondent. The Respondent then instructed that the rest of the cheques should not be banked. It is the creditor's case that the Respondent Company is unable to pay its debts within the meaning of Sections 219 (e) and 220 (b) of the Companies Act, and that the Company should be wound up.

The next creditor supporting the Petition for the winding up of the Respondent is Manson Hart (K) Ltd whose General Manager, Evans Kiragu, swore an Affidavit to the effect that Madison Hart (K) Ltd is the holder of a decree issued by the Honorable Court on 7<sup>th</sup> December 2007 arising from a judgment in RMCC No. 7776 of 2009. A copy of the decree is attached to his Affidavit. Pursuant to the said decree, the Respondent entered into a consent to settle the decretal sum by way of instalments. The Respondent subsequently paid Kshs 270,000 and thereafter defaulted in payment of the balance of the decretal amount. The Auctioneers have since then been unable to trace any attachable assets to satisfy the decree. Consequently, the creditor verily believes that the Respondent is unable to pay its debts. Against the above background, it is not in dispute that the Ministry of Public Works demanded payment under the guarantees. The payments were all made on 6<sup>th</sup> April, 2009, as follows –

**(i) Advance payment guarantee of Kshs 108,309,400 dated 12<sup>th</sup> April, 2006; a full demand of the same was made and paid.**

**(ii) Advance payment guarantee of Kshs 144,412,535 dated 12<sup>th</sup> April, 2006, a demand of Kshs 83,717,967.94 was made and paid.**

**(iii) Performance guarantee of Kshs 19,700,478, dated 13<sup>th</sup> April, 2006 wherein a full demand of**

**the same was made and paid.**

**(iv) Advance payment guaranteed of kshs 19,700,000; a demand of Kshs 17,727,541.76 was made and paid.**

A total sum of guarantee paid was therefore Kshs 229,455,388.70.

The Petitioner applied to this sum Kshs 32,358,378 being the only security held by it at its corporate Four Ways Branch to reduce the outstanding liability to Kshs 197,097,016.72 which is the amount of the debt claimed herein.

The Respondent's case is partly that the question of the validity of the guarantee is yet to be determined; that the Respondent strenuously contests the validity of the debt; and that the Statutory Notice issued to the Respondent was invalid as being contrary to express Statutory provisions. In that context, the issues to determine are whether the Respondent can be presumed to be unable to pay its debts; whether the notice to effect payments of the debt due was defective; and whether the Respondent can be made answerable for the debts, if any, where it contests the validity of such debts. Section 219 of the Companies Act sets out the circumstances in which a Company may be wound up by the court. Paragraph (e) thereof is to the effect that a Company may be wound up by the Court if the Company is unable to pay its debts. A Company's inability to pay its debts is prescribed in Section 220 which states as follows –

**“A Company shall be deemed to be unable to pay its debts**

**(a) If a creditor... to whom the Company is indebted in a sum exceeding 1,000/- 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 to 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 ...”**

Regarding the Performance bond, the law applicable is that a Performance bond stands on a similar footing to a letter of credit. A bank which gives the Performance guarantee must honour that guarantee to the letter. It is not concerned with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not; nor the question whether the supplier is in default or not. The Bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the Bank has notice. It was for this reason that in the case of TRANS AFRICA ASSURANCE CO. Ltd v CIMBIRA (EA) (2002) 2 EA 627 it was held that a bank or institution giving a Performance bond is bound to honour it in accordance with the terms of the bond if the papers are in order regardless of any dispute between the buyer and seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which the bank has notice.

Applying these principles to the facts of this case, the Respondent contends that the debt to the Ministry of Public Works is contested. However any difference between the Company and the Ministry do not affect the banks liability to the Ministry. Upon payment by the bank to the Ministry, the bank is entitled to reimbursement by the Respondent of the amounts paid, any differences between the Respondent and the Ministry notwithstanding. The Respondent is therefore truly indebted to the bank to the extent of all the monies paid on account of the Performance guarantees/bonds and advance payment guarantees.

The Respondent raises an issue regarding the notice by which the Respondent was called upon to pay the debt due. Its case is that the letter calling for payment did not give a respondent 21 days within which to pay. Without going into unnecessary details, the period of 21 days is to be computed not from the date of the letter of demand, but from the date when the letter was received at the Respondent's office. Provided that the Petition is not filed before 21 days elapsed from the date when the letter was left at the

Companies office, the Company can not be heard to complain. The Respondent contends that the demand was actually dispatched on 4<sup>th</sup> July, 2009 when the receiving office signed for it at the counter. Its counsel submits that the letter of demand having been dispatched on July 2<sup>nd</sup>, 2009, the Respondent is deemed to have been served 4 days thereafter that is as from 6<sup>th</sup> July, 2009. I note however that the petition in this case was filed in court on 8<sup>th</sup> February, 2010. Needless to say, the Respondent had more than six months and not just 21 days within which to respond to the demand note but did not do so. In the circumstances, I find that there was no breach of Section 220 of the Companies Act. I also note that Mbito J, took the same view in **M Weiss Ltd v The Companies Act** (cap 486) winding up cause No. 30 of 1989. The final point raised by the Respondent about the invalidity of the petition for not having been properly signed by the Petitioner is not borne out by the Petition before the court. I need not say more on that.

For the above reasons, I find that the Petitioner has established that the Respondent Company is unable to pay its debts as provided under Section 220 of the Companies Act, which is a ground for a Winding up order under Section 219 (e) of the Companies Act. The petitioner is therefore entitled to a winding up order as prayed.

If I was wrong in so thinking, there is also the supporting creditor in the person of David Gitonga Amuru who obtained a judgment against the Respondent in the sum of Kshs 3,418,195.00 together with interest and cost. After paying Kshs 100,000 in cash in part settlement of the decretal sum, the Respondent, issued cheques some of which were returned unpaid on the instructions of the Respondent who further instructed that the remaining cheques should not be banked. Consequently, execution issued on judgment and decree in favour of Gitonga Amuru was returned unsatisfied in part which thereby constitutes the Respondent's inability to pay its debts under Section 220 of the Companies Act which is yet another ground for ordering the respondent to be wound up.

In sum, I find that the Petitioner is entitled to succeed in this petition and I accordingly make the following orders –

- 1. That the company DIMKEN (K) LTD be wound up by the court under Section 219 (e) of the Companies Act.**
- 2. The costs of the petition to the Petitioner.**

Orders accordingly.

Dated and Delivered at Nairobi this 21<sup>st</sup> day of October, 2010

**L NJAGI**

**JUDGE**