



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**WINDING UP CAUSE 14 OF 2007**  
**IN THE MATTER OF AZETILAND CONSULTANTS LTD**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT**

**JUDGMENT**

The petitioner Hussein Hebatullah, a trustee of Burhani Foundation Kenya filed a petition seeking the winding up of Azetland Consultants Ltd (*hereinafter referred to as the company*) for the reason that the company had neglected to pay or failed to satisfy the sum of Kshs.5,730,000 /= being the amount due to the petitioner on account of rent collected by the company on behalf of the petitioner, particulars of which were provided by the petitioner at the hearing of the winding up cause. The petitioner stated that it had made demand and given due notice of the payment of the due sum under **Section 220(a)** of the **Companies Act** that provides that in the event that the company did not pay the demanded sum within three weeks of receipt of the notice, the petitioner would be entitled to deem that the company is unable to pay its debts. In the premises therefore, the petitioner urge the court to declare the company insolvent as it is unable to pay its debt and it would be just and equitable in the circumstances that the company be wound up.

Upon being served with the petition, the company through its advocate entered appearance. The company did not however file any papers in response to the petition filed for its winding up. Upon publication of the intended winding up of the company in the Kenya Gazette and in one of the local daily newspapers, Family Bank Ltd, through its assistant manager debt recovery unit, Richard Maungu, swore an affidavit in support of the petition. In essence, the bank stated that the company owed it a sum of Kshs.11,970,446.85 as at 12<sup>th</sup> January 2009 on account of an asset finance that it had advanced to the company. It was the bank's case that the company had failed to pay the said sum despite demand. The bank had been frustrated from realizing its security and therefore supported the petition for winding up.

After directions were taken, this court heard evidence adduced on behalf of the petitioner by Murtaza Mustafa Makai, an accountant and a member of the Dawood Bohra Muslim community, Burhani Foundation, Dawaat – E – Hadiyah and His Holiness Syedna Taher Saifuddin Memorial Foundation. The above organizations are non-profit making organizations established under Burhani Foundation. According to his evidence, the company through its directors, Henry Kibwogo and James Kebwage entered into an agreement with the petitioner by which the company was authorized to collect rent from various premises owned by the foundation on behalf of the petitioner on commission basis. The properties in question were situate at Kitale Lane and Dominion House. The company was required to also collect rent from tenants who occupied certain vacant plots owned by the petitioner.

The agreement between the company and the petitioner was entered in April 2005. About a year later, the officials of the petitioner realized that whereas the company was collecting rent from the tenants, the company was not remitting the same to the petitioner. Several meetings were held with a view to resolving the issue. The company, through its directors, gave undertaking that they would settle the outstanding amount but failed to do so thus compelling the petitioner to issue notice in pursuant to **Section 220(a)** of the **Companies Act**. He testified that according to computation by the petitioner, the company owed it the sum of Kshs.11,265,500 /=. He produced documents in support of the petitioner's claim. The evidence adduced by the petitioner was uncontroverted. Similarly, the evidence adduced by

Richard Katiwa Maungu on behalf of the family bank to the effect that the company owed the bank the sum of Kshs.11,970,446 /= was uncontroverted.

Under **Section 220(a)** of the **Companies Act**, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do. In my view, all that is required of a petitioner under this section is to establish that the company is unable to pay a debt that is legitimately due from it. It will not do if the debt is disputed. In the present proceedings, it was clear, according to the uncontroverted evidence adduced on behalf of the petitioner, that the company is indeed unable to pay its debt. Under **Section 219 (e)** of the **Companies Act**, this court has the requisite jurisdiction to wind up a company if it is established that the company is unable to pay its debts.

I therefore hold that the petitioner has established a just case for the winding up of the company. The company is therefore ordered wound up as prayed by the petitioner. The petitioner is authorized to appoint a receiver in accordance with **Section 231** of the **Companies Act** for the purposes of liquidating the company with a view to settling, on priority basis, the debt owed to the petitioner by the company. The debt owed to Family Bank Ltd was secured. The bank is entitled to realize the security charged to it. The costs of the petition and of the receivership shall be paid from the assets of the company. It is so ordered.

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JUNE 2009**

**L. KIMARU**

**JUDGE**