



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

Civil Case 112 of 2008

RELIABLE SECURITIES LIMITEDPLAINTIFF

VERSUS

POLYCARP OBINA ALBERT ONYANCHA *t/a*

ATTIC CONSULTANTSDEFENDANT

R U L I N G

Chamber summons dated 4.3.2008 seeks orders to restrain defendants from instituting filing, lodging, commencing, advertising or otherwise. Prosecuting any winding up petition or cause against the plaintiff in relation to the disputed contract debt of Kshs.591,201/= which forms the basis of defendant's winding up notice and demand dated 13/2/2008 or any other sum based on the plaintiff's contractual relationship of building works with the defendants pending the hearing of this suit. The grounds upon which the application is made are set out in the application and is supported by affidavit of Josphert Milimu Konzolo, the Managing Director of the plaintiff's company. It is shown that the parties were involved in contractual transaction and the defendant is claiming Shs.591,201/= from the plaintiff. From the exhibits attached to the affidavit the plaintiff disputes that debt and correspondence have been exchanged.

However the defendant wrote a demand letter and notice to file a creditor's winding up petition against the plaintiff. The notice is made under **Section 221** of the **Companies Act** on the ground of the plaintiff being unable to pay its debts. The notice was for a period of 21 days. The provision of the law provides that (**Section 219 (e)**) "the company may be wound up by court if the company is unable to pay its debts", and the company shall be deemed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding Kshs.1000/= then due has served on the company by leaving it at the registered office of the company a demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay or to secure or compound for it to the satisfaction of the creditor.

In this case the defendant states that the plaintiff issued a cheque for Kshs.500,000/= which bounced see defendant exhibit PO1. When defendant notified the plaintiff, the plaintiff purported to terminate the said contract effective 26/4/2007. After this event the parties made a fresh agreement orally. The works was done and final account was furnished but the plaintiff indicated some works was not done. This was completed and a final invoice was sent to the plaintiffs by defendant.

According to the defendant this invoice comprised Kshs.500,000/= unpaid cheque. Upon examination of the record it is clear the parties are not in agreement as to the amount of debt. But the

plaintiff has deposited Kshs.590,000/= in accordance with a court order. It cannot therefore be said the plaintiff is unable to pay its debt. In the appeal of Matic General Contractors Ltd. vs. K.P. & Lighting Co. Ltd. – Appeal No. 26/2001, the Court of Appeal (A.B. Shah, J.A) said that a winding up petition cannot be used to enforce or extract a disputed debt. Such a process may in fact be stigmatized as a scandalous abuse of process of court.

“A winding up petition is not legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed”

This was contained in a passage in Buckley on the Companies Act (11th Ed.) page 356, 357 and was quoted in this appeal. The counsel for applicant also relied on Stonegate Securities Ltd. vs. Gregory where it was held:

“Since there was a bona fide dispute whether the money was presently due from company to the defendant and there was evidence that the defendant was threatening to present a petition the company was entitled as of right to an injunction”

Consideration must be given to the arbitration clause in the contract of construction works between the parties. The defendant was entitled to resolve the dispute by referring the same to arbitration before taking or threatening to take any legal proceedings.

Upon considering the material placed before the court and the cited authorities. It is my finding that there is no evidence that the plaintiff is unable to pay its debts in accordance with Section 219 (e) and 220 of Companies Act.

Injunction is therefore granted as prayed in the chamber summons prayer 3 thereof with costs to the applicant.

DATED and DELIVERED at Nairobi this 22nd day of September 2008.

JOYCE N. KHAMINWA

JUDGE