



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Winding Up Case 20 of 2008

IN THE MATTER OF RISKPLAINTIFF

MANAGEMENT INSURANCE BROKERS

VERSUS

IN THE MATTER OF COMPANIES ACT..... DEFENDANT

RULING

Notice of Motion dated 29.09.2008, praying for restraining order against the Petitioner from publishing of gazette of the petitioner and from re-advertising or notifying any other person of the institution of the above winding up cause and that the petition be struck out.

Several grounds are set out (11 in all) and the Application is supported by affidavit of Karungu Mbuthia sworn on 29.09.2008. The petition is filed by Statutory Manager on behalf of Invesco Assurance Co. Ltd (under statutory management). The Petitioner claims a debt of Kshs.1,010,186.16 being value of premiums paid to the company on behalf of the petitioner. It is alleged that statutory notice has been served.

The supporting affidavit sworn by the Managing Director of the Applicant Company. It is shown that the Company had been operating in the business of Insurance Brokerage for the last 10 years as a registered broker and has wide clients and customer base in Nairobi and Mombasa. It is sworn that since 2003 the company has had a dispute and a letter on the subject is exhibited as Exhibit KM1. Exhibit KM 2 is a long statement of dealings which are disputed as sworn under paragraph 6 of the supporting affidavit. Exhibit KM 5 are the demand letters Claiming the debt and threatening to file a winding up petition against the company. The threats were responded to in the letter exhibit KM 7.

Nonetheless, the Notice of Winding Up the company was advertised apparently in the Daily Nation Exhibit KM 8. The applicant denies the debt and claims that the petition is an abuse of the winding up procedure and should be struck off. Furthermore, the Applicant states that the provisions of Rule 23 of the Winding Up rules as to advertisement have not been complied with.

The company has filed an affidavit in opposition of the petition saying that if the debt was genuine the company would be able to pay. It is solvent. In support of the application he cited authorities:

1. ***Re-Standard Ltd, Ex parte Tricom Paper International BV, reported in (2002) 2 KRL at page 644.*** The court held that if a petition is intended to enforce the payment of disputed debt, it will be treated as an abuse of the process of court and will be struck out.

The facts as reported are that the company had acknowledged being in debt to the petitioner and had even written out a cheque. The dispute was in respect of amount of interest. There was evidence that interest charges has been agreed upon. The court found the debt not disputed at all. The 2nd authority relied upon is

2. ***Kenya Cashewnuts Ltd –vs- National Cereals & Produce Board, reported in 2002 1 KLR at 652.***

In that case, the issue of proper notice under section 220 (a) Companies Act was discussed. The court held that

“the service of a valid statutory Notice under section 220 (a) of the Companies Act is a condition precedent to the success of a creditors petition grounded on the Companies inability to pay its debts

Also that demand letters and statutory notices must be under the hand of the creditor as provided under the aforesaid section. In this case the letters of demand and notices were issued by a body known as Neptune Management Ltd. This is contradictory with the provisions of law.

In this case, also the debt had never been admitted. Upon considering all the submissions of the Applicant Company it is clear that the Petitioner is bent on enforcing a debt which is disputed and there is no basis shown to hold otherwise the application is not opposed.

In the circumstances the Notices of demand were not issued according to law and the purpose of the petition is clearly to enforce a debt that is disputed and whose basis is not established.

I therefore allow application and grant orders as prayed under prayers 3 and 5. The petition is struck out with all costs of petition and this application to the applicant/Company.

Orders accordingly.

DATED this 10th day of November 2008.

JOYCE N. KHAMINWA

JUDGE