REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Winding Up Cause 1 of 2005

IN THE MATTER OF: AFRICAN SAFARI CLUB LTD

AND

IN THE MATTER OF: THE COMPANIES ACT (CAP 486)

RULING

On the 9th March 2005, Universal Hardware Limited (the Petitioner) presented to this court a petition for the winding-up of African Safari Club Limited (the Company) on the ground that the Company is unable to pay its debts, that inability being deemed to have been established by the non-compliance with the terms of the statutory notice served by the Petitioner on the Company on the 2nd February 2005 under section 220 of the Companies Act (the Act).

Upon being served with the petition, the Company, on the 17th March 2005, applied under section 3A of the Civil Procedure Act, Order 6 Rule 13(1) (d) and Order 39 of the Civil Procedure Rules as well as under sections 219, 220 and 221 of the Act and Rules 5 (2) and 203 of the Companies (Winding Up) Rules for an injunction to restrain the Petitioner from advertising the petition and the striking out of the petition. The application is based on the grounds that the petition is an abuse of the process of court in that it has been filed to blackmail and bring pressure on the Company to pay a disputed debt; that the company court cannot be used for debt collection especially when the debt is hotly contested; that the company is not insolvent; that the Petitioner has not obtained a court decree against the Company and that the advertisement of the petition will be ruinous to the Company as it will cause it to suffer irreparable loss.

In support of the application Renato Bachmann, a director of the Company swore an affidavit in which he deposed, *inter alia*, that the alleged debt arose from the supply by the Petitioner of building materials including paint to the Company. The paint turned out to materially defective and the colour has now mostly faded out. As a result the existing paint work has to be scrapped off and repainted resulting in additional labour costs as well as loss of revenue whilst the hotel in which it was used will have to be closed to carry out these works. He annexed to the affidavit a SGS Report on tests carried on the paint allegedly supplied by the Petitioner stating that the classic brand provided and delivered by the Petitioner does not conform to the Kenya Bureau of Standards specifications.

In his affidavit in opposition to the petition filed on the 21st March 2005, Mr. Bachmann annexed a report from a contractor stating that it will cost the Company about Sh. 26 million to repaint the Hotel.

Also annexed to both affidavits is a copy of a letter dated 8th March 2005 addressed to the Petitioner by the Company's lawyers in response to the statutory demand. The letter stated that the statutory demand is defective in that it was served on plot No. 1067/I/MN which is not the Company's registered office. The letter also stated that the Company has sufficient funds to pay the debt but is disputing it on the grounds of overcharging of upto 83% over and above the market price of the items, supply of non-genuine parts and passing them off as genuine ones, supply of inferior quality paints and invoicing for items not supplied.

In both affidavits Mr. Bachmann also reiterated the claim that the statutory demand was not served at the registered office of the company. He also refuted the Petitioner's claim that the Company is insolvent and stated that the Company which has been carrying on tourism business since 1967 brings into the country approximately 50,000 tourists per annum. It has a work force of 2500 employees with a monthly wage bill of Sh. 27 million. This together with other payments it has a total monthly outlay of approximately Sh. 110 million which it comfortably pays every month.

On 18th March 2005 Lady Justice Khaminwa granted the Company an ex-parte order of injunction restraining the Petitioner from advertising the petition. Contrary to the provisions of Order 39 Rule 3 (2) the order was for a period of more than 14 days. The Petitioner was not amused with that. On 23rd March 2005 it filed a Notice of Motion under section 220 of the Act Rules 2, 3, 7, 23, 24, 202 and 203 of the Companies (Winding Up) Rules and Rules 3 and 4 of the Companies (High Court) Rules as well as Order 6 Rule 13 (1), Order 18 Rule 2 (1) & (2), Order 50 Rules 2 and 17 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application mainly sought to set aside the said ex-parte order of injunction restraining it from advertising the petition on the grounds that it was made without jurisdiction being for a period of more than 14 days in clear contravention of Order 39 Rule 3 (2) of the Civil Procedure Rules, and that there was not only no affidavit evidence to justify the making of that order but also that the affidavit of Mr. Renato Bachmann in support of the Company's application giving rise to the order failed to disclose material facts, is singularly lacking in candour and wholly misleading.

If the ex-parte order of injunction is not discharged the Petitioner seeks in the alternative the dismissal of the Company's Application of 17th March 2005 on the grounds that the purported dispute alleged by the Company for the first time on 8th March 2005 (a day before the petition was filed and more than 21 days after the statutory demand was served on the Company is clearly an afterthought; that the whole debt not being disputed the Petitioner is entitled to a winding-up order over part of the debt which is admitted; that the Company having failed to settle the debt within 21 days of the statutory demand it is deemed to be insolvent and that the Petitioner is not required to obtain judgment prior to commencing winding up proceedings under section 220 of the Act.

In support of the application Mehul Rawal a director of the Petitioner swore an affidavit on the 22nd March 2005 in which he repeated and amplified the grounds upon which the application is made. He added that the Petitioner served the statutory demand at the Company's head office at plot No. 1066/67/I/MN because the company file in respect of African Safari Club Limited could not be traced at the Companies' Registry in spite of several attempts having been made by his advocates; that the dispute being raised on 8th March 2005 is an afterthought the Petitioner having made the last delivery to the Company in August 2004; that the allegation of overcharging is also an afterthought and absolutely untrue as the prices of items were agreed and quoted on the Company's LPOs before supply; that there is nothing to prove that SGS examined paint supplied by the Petitioner and not any other Company and that the issue of discounts were orally requested by the Company at several meetings held by him and the Company's directors but the same were rejected. He annexed to his affidavit copies of the Company's computer records which he said he obtained from the Accounts staff of the company showing that the company had reclaimed Value Added Tax (VAT) as input tax from Kenya Revenue Authority in respect of most of the invoices covering the goods supplied. In his view the sum of Sh. 24,098,476.56 is clearly due and owing from the Company to the Petitioner and the Company's attempt to raise a dispute is a clearly disingenuous afterthought which should be rejected. He gave details of the goods ordered by the Company as the ones supplied by the Petitioner. In particular he singled out the toilet seat covers and said the Petitioner supplied the heavy duty type which the Company had ordered. With regard to the one hole basin mixer he exhibited a copy of the Company's LPO to show that the Company did not order for one made in Germany as it now claims. Paint is another item he singled out and said that the Company never ordered for Sadolin Paint Grade but Sadoflat purchased from Sadolins as requested. He annexed to his affidavit a bundle of documents in support of his averments.

In Reply to the Petitioners application Renato Bachman swore and filed another affidavit on 5th April 2005 in which he disputed literally every averment contained in Mr. Rawal's said affidavit. With regard to the dispute he denied that the same was raised for the first time in the Company's Advocates' letter of 8th March 2005. He said that the same had orally been raised as early as 17th November 2004 and in several meetings the Company officers had with the Petitioner's. He said that the main issue the Company has with the Petitioner is the overcharging and delivery of inferior products while charging for genuine ones. He said the inferior products are available for inspection and verification by the court.

With regard to the computer records he said that the same has a myriad of invoices from other suppliers. He stated that the dubious manner in which the Petitioner obtained those records says a lot about the Petitioner's integrity. He also annexed copies of numerous documents in support of his averments.

With leave of the court both parties filed further affidavits in which they raised more or less the same issues albeit with more details and more annextures. The only additional point Mr. Mehul Rawal raised in his affidavit sworn and filed on the 19th May 2005 is that on the 29th April 2005 he personally visited the Companies' Registry and was informed that the Company's file in respect of this matter is irretrievably lost and cannot be found.

In Mr. Renato Bachmann's affidavit sworn and filed on the 6th June 2005 the new issues raised include the averment that the Petitioner was the only supplier of classic paint to the Company. As a result of the poor quality paint the Petitioner supplied, the Company has a counterclaim of Sh. 26,687,598.40 against the Petitioner representing the cost of scrapping and repainting the hotel and the loss of income it will suffer as a result of closing down the hotel to repaint. He also made serious allegations of collusion between the Petitioner and the Company's junior staff to defraud the company by accepting inferior quality items and charging for superior heavy duty quality items.

Both the applications were heard together as in my view the success of one would deal a fatal blow to the other or at least a substantial part of it. Over a period of several days counsel deligently argued their respective clients' cases and quoted several authorities. I am indebted to them for supplying me with copies thereof thus making my work a lot easier than it would have been if I had to go looking for the reports myself. I will in due course refer to counsels submissions and those authorities.

Before the applications were argued Mr. Inamdar, counsel for the Petitioner raised a preliminary objection that the Company having not filed in time the affidavit in opposition to the petition it had no *locus standi* and should not be given audience. In support of that argument he relied on the Court of Appeal decision in **Shah – Vs – Midco Holdings Limited, Civil Appeal Nos. 13 & 14 of 2000** and three High court cases – **Re Techpack Industries Limited [2002] 2 KLR 319, Re Charansons Limited [2002] LLR 2573** and **Re Lakestar Insurance Company Limited [2003] LLR 2135** – following it.

On his part Mr. Swaleh, counsel for the Company, submitted that the Company was properly on record. It had upto that time not been served with the verification affidavit and the Company's affidavit in opposition to the petition filed on 21st March cannot be said to be out of time.

I overruled that objection and held that though Rule 25 does not provide for the service of the verification affidavit it does not mean that it should not be served. As stated by the Court of Appeal in **Shah – Vs – Midco (supra)** if a Company fails to file an affidavit in opposition to the petition within seven days of the filing of the verification affidavit it "shall be in the same position as a defendant who has not filed a defence in an action." In the circumstances the verification affidavit occupies the same position as the summons to enter appearance and must be served upon the company.

Having overruled the Preliminary Objection I held that the Company has *locus standi* and it is perfectly entitled to rely on the affidavit in opposition to the petition. I now wish to revert to the two applications.

As can be seen from the facts as summarized above several points fall for determination. The first point raised in the Company's application is whether or not this petition is competent, the Petitioner having failed to serve the statutory demand at the Company's registered office as required by section 220 of the Act. Corollary to that is the Company's argument that the petition is also incompetent for failure to state the registered office of the company and its share capital.

Before I consider these points I wish to state that winding up a company is a draconian step. It is a most drastic step which the retired Justice Kwach, in **Matic General Contractors Limited – Vs – The Kenya Power and Lighting Company Limited, Civil Appeal No. 26 of 2001 (C.A.),** said amounts to "corporate execution". In **Kenya Cashewnuts Limited – Vs – National Cereals & Produce Board [2002] 1 KLR 652** Ringera J (as he then was) likened it to "passing a death sentence on an individual." I agree with those views and add that winding up a company is a serious matter which should be treated with the seriousness it deserves. Before a court makes a winding up order therefore, nay, even deals with a winding up petition it must be satisfied that all the prerequisite procedural steps have been taken. What are these procedural steps? They are several. I will start with the statutory notice.

In this case the Company is being wound up under section 219 (e) of the Act for being unable to pay its debts. The section states that:

"A company may be wound up by the court if –

a) ……

b) ……

c) ……

d) ……

e) the company is unable to pay its debts."

Section 220 states when a company "is unable to pay its debts." It provides that:

"A company shall be deemed to be unable to pay its debts –

(a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings 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 or compound for it to the reasonable satisfaction of the creditor…."

In winding up a company on this ground, the statutory notice is a very important document. It is the one which intimates to a company that serious action is contemplated against it. In this case the Company contends that the notice is defective in that the same was not served on the Company at its registered office. Section 220 (a) which I have just reproduced herein above talks of the notice being "served on the company, by leaving it at the registered office of the company." What do we understand this provision to mean?

Before I answer that question I should point out that the section also gives the company three weeks to react to the demand notice failing which it shall be deemed to be unable to pay its debts. Time is therefore of crucial important. The company has to have knowledge of the notice for at least three weeks and fail to pay before it is deemed to be unable to pay its debts. To me this means that the notice has to be served on a responsible officer of the company who will understand its importance. The words "by leaving it at the registered office of the company" must therefore be understood to mean leaving it with either the company secretary, director or other principal officer of the company. Surely the company cannot be said to have had knowledge of the notice when the same is left with a messenger. It is only after it has been demonstrated that an effort has unsuccessfully been made to serve any of these officers that service on any other employee of the company can be accepted.

Although section 220 does not provide for service of the statutory notice at any other place except the registered officer of the Company, I am prepared to accept service at the Company's principal place of business if it is shown that an unsuccessful effort has been made to serve it at its registered office.

In this case, as is stated in the returns a copy of which is annexed to the affidavit of Renato Bachman in support of the company's application which was filed before this petition was instituted, the registered office of the company is said to be at Rex House **L.R. No. Mombasa Block XXI/64,** Moi Avenue Mombasa. It has not been shown that any effort was made to serve the notice at this address. The notice reproduced in the petition states that it was served on plot No. 1067/1 MN which is not the registered office of the company. If the affidavit of service of the Petition is any thing to go by it would appear that both the Petitioner and its advocates assumed that the registered office of the Company is at Plot No. 1066/67/I/MN. At the foot of the Petition the address of service is stated to be at Plot No. 1067/66/I MN. It is not clear if these three numbers relate to one and the same office. It has also not been shown that any effort was made to serve the notice on any responsible office of the Company.

Taking all these factors into account I hold that the statutory notice in this case was not properly served and the same is of no effect.

The other point taken by Mr. Swaleh on behalf of the Company which is the next procedural step that must be taken, is that the Petition failed to state important and mandatory details about the Company. It failed to state the details of the Company's registered office, its share capital and its objects. He said that the Petition does not therefore conform with Rule 21 of the Rules and the same is incompetent.

Rule 21 states that "Every petition shall be in Form No. 3, 4 or 5 with such variations as circumstances shall require." Form 4 which is the one relevant to this matter requires the Petitioner to state the registered office as well as the postal address of the company to be wound up, its nominal capital and the amount of each share and the objects for which the company was established as well as the petition debt. The **Practice and Procedure of the Companies Court by Alan Boyle and Philip Marshall** classifies these details as fundamental and states that they must be stated in a petition. I concur with that view and add that failure to state them renders the petition incompetent.

In this case Mr. Inamdar conceded that the details of the Company's registered office, its share capital and its major objects are not stated in the Petition. He gave the reason for that failure as his office's failure to trace the Company's file at the Companies' Registry.

I doubt if the Petitioner made any attempt to ascertain the registered office of the Company. I have reached this conclusion on two grounds. The first one is what I have already stated: that the employees of the Petitioner and those of its firm of advocates assumed that the registered office of the Company was at Plot No. 1066/67/I/MN. This, as I have already said, is clear from the affidavit of service of the petition in which the process server states that with a representative of the Petitioner he went and served the Petition at that address as the Company's registered office.

The other reason is that I do not believe the averments in the affidavits of Mr. Mehul Rawal, a director of the Petitioner, that he and his advocates' office made attempts to trace the Company's file at the Companies" Registry. Mr. Rawal states in the verification affidavit that he is informed by his advocates that the Company's file at the Companies' Registry cannot be traced. He does not say who in particular gave him that information. He annexed to that affidavit a note from the Petitioner's advocates' office which is itself written by somebody other than the one who attempted to locate the file.

In his further affidavit sworn on 19th May 2005 Mr. Rawal states that he himself visited the Companies' Registry on the 29th April 2005 but the Company's file could still not be traced. Given the way he obtained the Company's computer records which puts to question his intergrity, I am not prepared to take his word on this. He did not exhibit anything to support that contention. In any case that was in April 2005 long after the Petition, without the required details, had been filed.

As I have already stated winding up a company is a serious affair. Madan JA said the same thing in **Cruisair Limited – Vs – CMC Aviation Limited (No. 2) [1978] KLR 131** when he remarked at page 141 that "it is a serious matter to order a trading company to be wound up". I cannot therefore rely on the kind of material as the one placed before me in this case as a basis for a winding up petition. Consequently I find that no or no serious attempt was made to trace the Company's file and failure to state in the petition the particulars of the Company's registered office as well as its main objects is inexcusable and that renders this petition incompetent.

This Petition is also for striking out on the ground that it is an abuse of the court process. A petition for winding up a company on the ground of inability to pay its debts is an abuse of the court process when it is based on a disputed debt. And a debt is said to be disputed when it is disputed on substantial and not on frivolous grounds. There are numerous English authorities on this point quite a number of which have been applied to local cases. In **Mann – Vs – Goldstein [1968] 2 ALL ER 769** Ungoed – Thomas J stated this at page 775

"…the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, unless a creditor is established as a creditor he is not entitled to present the petition and has no *locus standi* in the Companies court…. The legitimate purpose of such a process is to wind up a company on a ground specified in the Companies Act 1948 which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because section 224 makes a prerequisite that he should be a creditor before he is even entitled to present a petition at all and before the consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the Company is insolvent."

This statement was quoted with approval by the Court of Appeal for Eastern Africa in the case of **Cruisair Limited – Vs – CMC Aviation Limited (No. 2) [1978] KLR 131.** Also quoted in that case is the following statement from Buckley on the Companies Acts (11th Ed) pages 356, 357:

"A winding up petition is not a 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 and under circumstances may by stigmatized as a scandalous abuse of the process of the court."

What is a substantial ground, in my view, differs from one case to another. In **Re Welsh Brick Industries, Limited [1946] ALL E.R. 197** it was held that there being a fair probability that the company has a *bona fide* defence which would entitle it to an unconditional leave to defend a claim in the ordinary court is not enough. There must be some substantial ground for defending the action. For instance where there is a question as to whether there is in fact a debt or not that is of course a substantial ground warranting the striking out of the petition as an abuse of the process of the court. See **New Travellers Chambers Ltd – Vs – Cleese and Green (1874) 70 LT271.**

If, however, the dispute is based on frivolous grounds the petition will be allowed to go on. In **Re London and Paris Banking Corporation, Equity cases 444** Sir G. Jessel MR stated that "It is not sufficient for a company to say "we dispute the debt'; they must show some reasonable ground for doing so." In **Re Anglo – Bavarian Steel Ball Company (2) (1899) WN 80** cited with approval in **Tanganyika Produce Agency Limited [1957] EA 241** it was held that:

"If it is shown that an alleged dispute is not a bona fide one the objection to the petition fails. Thus it is not uncommon for a company, after again and again begging for time for payment of the debt to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion and meets with no favour from the court."

The Company's case is that it is not insolvent as alleged by the Petitioner. It has enough funds to settle the Petitioner's claim if the same were genuine. It contends that the alleged debt arose of building materials, including paint supplied by the Petitioner. The paint turned out to be materially defective and the colour has now faded out requiring it to be scrapped and the hotel repainted.

The Company also claims that apart from being over charged upto 83% of the market price of the goods supplied the Petitioner supplied it with inferior quality goods but charged for genuine ones.

The Petitioner's case on the other hand is that the alleged dispute is an afterthought, the last delivery of goods having been made to the Company in August 2004 while the alleged dispute was raised for the first time on 8th March 2006.

I have considered these rival submissions and the averments in the parties' respective affidavits as well as the annextures thereto. The Company claims that it raised the dispute, especially on the issue of overcharging quite early in meetings it held with the Petitioner.

The Petitioner, while admitting that such meetings did take place, contends that all that the Company asked for was a discount which was refused as prices were agreed before supply.

This, in my view, is an issue that cannot be resolved on affidavit evidence. The Petitioner's claim also that the Company has claimed VAT on the goods it supplied to the company as input tax requires a thorough examination of documents. Whether or not the paint alleged by SGS to have been substandard and has now faded away requiring the repainting of the hotel where it was used and whether or not the Company's alleged counterclaim of Sh. 26,000,000/= is well fonded is also a matter that cannot be resolved on affidavit evidence.

I am satisfied that these are seriously disputed issues that call for a full-fledged hearing. They are not matters for the Company court as it is not a forum for deciding disputed debts. See **Cruisair Limited – Vs – CMC Aviation Limited (2) Supra.**

It is true as Mr. Inamdar argued that other than its Advocates letter of 8th March 2006 there is no document from the Company to show that it disputed the debt. He contended that the Company neglected the Petitioner's pleas for payment. However where there is a dispute on substantial grounds as here that defeats the contention that the Company has, within the meaning of section 220 (a) of the Act neglected to pay. See **Re Lympne Investments Limited [1972] 2 ALL ER 385.**

For these reasons I find that this petition is incompetent and an abuse of the process of court. I accordingly strike it out with costs to the Company.

Having struck out the Petition the Petitioners application also stands dismissed with costs to the Company..

DATED and delivered this 17th day of November 2006.

D. K. MARAGA

JUDGE