



REPUBLIC OF KENYA

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

Misc Application 853 of 2004

PAVEMENT

LIMITEDAPPLICANT

VERSUS

ASCOT ENTERPRISES LIMITED1ST
RESPONDENT

REYNOLDS & COMPANY LIMITED2ND
RESPONDENT

MULTIPOINT INTERNATIONAL LIMITED.....3RD
RESPONDENT

RULING

I have before me an Application by way of Motion on Notice expressed to have been brought under the provisions of the Companies Act, the Judicature Act and Section 3A of the Civil Procedure Act, Order XXXIX of the Civil Procedure Rules and the Companies High Court Rules. The application is by PAVEMENT LIMITED whom I will refer to as the “Company”. The application seeks one main order which is that the Respondents be restrained from presenting to this court or any other Court or in any other way proceeding with the Winding Up Petition of the Company based on the sum of Kshs 7,500,000/= in the Statutory demand dated 9th November, 2004 served on the Company on the 11th November, 2004 and or any other claim.

The main grounds for the application are: that the said sum of Kshs 7,500,000/= was for equity; that there is no loan agreement for the alleged loan; that no judgment or decree has been obtained in respect of the alleged loan; that the Respondents served the statutory demand maliciously with the sole purposes of embarrassing and putting pressure on the company to pay the disputed loan; that the said Notice is calculated to harm and injure the reputation of the company and that presentation of a petition will ground the company’s operations.

The application is supported by an affidavit sworn by one Shailesh Patel director of the company. To the said affidavit are several annexures exhibited.

The application is opposed and there is a Replying Affidavit sworn by one Jeffrey Walter Pereira a director of the 3rd Respondent who has also sworn the affidavit on the authority of the three Respondents. The affidavit has several annexures exhibited.

The application was canvassed before me on 2nd February, 2005 by Mr. Omolo Learned Counsel for the Company and Mr. Inandar Learned Counsel for the three Respondents.

In a nutshell the company's case is that the Respondents paid the said sum of Kshs 7,500,000/= as equity in a joint business venture and when the company failed to do well financially they unilaterally converted the equity into a loan. This, according to the company, the Respondents were not entitled to do as they ventured into business with all its inherent risks and cannot escape the risks by merely converting equity into a loan. The Company maintains that in any event there is no loan agreement between the Company and the Respondents and in fact the alleged loan is disputed. In the premises there is no basis for Winding Up proceedings and this Court should grant the orders sought.

The gist of the Respondents case on the other hand is that initially the said sum of Kshs 7,500,000/= was paid as equity and their interests in the company were to be held by a company called Alleyway Limited. They however, received little or no business or accounting information regarding the venture. Indeed no shares in the company were made available to the Respondents. As the initial purpose for the said payment of Kshs 7,500,000/= failed, the Respondents demanded the same. Upon the said demand the company agreed to treat the said sum as a loan and proposed payment by installments. This conversion to a loan according to the Respondents was not unilateral but was by consent. The same has been unequivocally admitted and there is no dispute in respect of the loan at all. In the premises, the issue of a loan agreement is irrelevant.

In the circumstances, the Respondents had no alternative but issue the said statutory demand as the promises to pay had not been kept despite numerous requests for payment.

From the arguments presented the principal issues for determination are whether or not the Respondents unilaterally converted their equity shareholding into a loan; whether or not the purported loan should be treated as a loan in the absence of a loan agreement or judgment; whether or not the purported conversion of equity into a loan is still the subject of discussion between the parties and therefore is disputed and whether or not the Respondents served the statutory demand maliciously with the sole purpose of embarrassing and putting pressure on the company to pay the disputed loan.

The root of the dispute to my mind is whether or not the Respondents converted their equity shareholding into a loan. The rest of the issues argued are dependent on this dispute. It is common ground that the initial reason for the payment of the said shs 7,500,000/= by the Respondents was for equity in the company. The material availed leaves no doubt that the Respondents own no shares in the company for which the said payment had been made. This was the position at the time the statutory demand was served by the Respondents. It is still the position now. It is also obvious that Alleyway Limited, the company that was to hold the shares for the Respondents in the Company was not allocated any shares in the Company. Again this was the position at the time the statutory demand was made and is still the position now. The position therefore remains that the Respondents paid Kshs 7,500,000/= for equity in the company but have no single share in the company. It is therefore not surprising that the said sum was converted into a loan.

The material available further established that the act of converting the equity into a loan was not unilateral. All the relevant parties accepted this event after discussion. Correspondence exchanged between the parties is very clear on this issue. The company accepted this position and offered to pay the Respondents. This is indeed the position conveyed in the latter dated 26th November, 2003 addressed to the advocates of the respondents which letter is exhibited by the company as part of "SP5".

There is no dispute that the Respondents made the said payment of shs 7,500,000/=. This fact is freely admitted by the company. I have found that all the interested parties agreed to convert the said sum into a loan. The company then made proposals for payment of the said sum. Under these circumstances, in my view evidence of a loan agreement is irrelevant. I have also found that the indebtedness of the company to the Respondents is no longer an issue for discussion and that the said indebtedness is not disputed even by the company.

In the premises the Respondents were entitled to serve the statutory demand. The same was not malicious nor was it calculated to harm and injure the reputation of the company. These findings completely destroy the foundation of the company's application as the findings clearly show that the company does not have a *prima facie* case with a probability at all. The company is therefore not entitled to the injunctive relief sought.

The order of this Court therefore is that the company's application dated 10th December, 2004 has no merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2005.

F. AZANGALALA

JUDGE

Read in the presence of: