REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION –MILIMANI

Winding Up 16 of 2005

IN THE MATTER OF PRIME OUTDOOR NETWORK LIMITED

AND

IN THE MATTER OF COMPANIES ACT

RULING

I have before me an Application by way of a Motion on Notice to strike out a Winding Up Petition presented in Court on 4th May 2005. The Petitioner, National Industrial Credit Bank Ltd (hereinafter referred to as "*the Petitioner"*) seeks a winding up order against Prime Outdoor Network Ltd (hereinafter referred to as *"the Respondent")*.

The basis of the petition is that the Respondent is indebted to the Petitioner in the sum of Kshs 4,570,6530.05 as at the time of presenting the Petition on account of a bills or invoice discounting facility availed to the Respondent by the Petitioner which was later converted to a term loan and which the Respondent has refused or neglected to pay. On the Respondent's failure to respond to demands for settlement the Petitioner thro ugh its Advocates issued a Winding Up Notice. The Petitioner is of the view that the Respondent is insolvent and unable to pay its debts within the meaning of Section 219 and 220 of the Companies Act. The Respondent does not agree and wants the Petition struck out on two main grounds: that:-

1. No sufficient reason has been disclosed in the Petition to wind up the company.

2. Because there is no sufficient ground to wind up the company the petition is an abuse of the process of the Court.

In substantiating these grounds Counsel for the Respondent submitted that the Winding Up Notice is defective for the reason that it is not under the hand of the Petitioner. Counsel argued that the notice contravened Section 220 (a) of the Companies Act. For this proposition reliance was placed upon the case of **KENYA CASHEWNUTS LTD –V- NATIONAL CREASLS & PRODUCE BOARD [2002] 1 KLR 652** in which Ringera J. as he then was held that service of a valid statutory notice under Section 220 (a) of the Companies Act is a condition precedent to the success of a creditor's petition grounded on the companies inability to pay its debts.

Further reliance was placed upon the case of **BRAHMBHATT –V- DYNAMICS ENGINEERING LTD [1986] KLR 133** which was a decision of the Court of Appeal in which their Lordships held that in an Application to strike out a Winding Up Petition the Court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail.

It was argued for the Respondent that as no sufficient ground was disclosed in the Petition, the petition was bound to fail and further that a petition which did not disclose any sufficient ground is an abuse of the process of the Court.

The Petitioner resisted the Application and maintained that the Respondent was unable to pay its debts and the issue of the Respondent's indebtedness to the Petitioner was not disputed. Reliance was placed upon the case of **GLOBAL TOURS & TRAVELS LTD & THE COMPANIES ACT: WINDING UP CAUSE NO.43 OF 2000 (UR)** for the proposition that it is not just any dispute regarding the debt that counts.

The debt must be disputed on some substantial ground. Reliance was also placed upon the case of **BRAHMBHATT –V- DYNAMICS ENGINEERING LTD [1986] KLR 133** for the proposition that if a Petitioner has sufficient ground for petitioning motive is irrelevant. Ringera J. as he then was **IN THE MATTER OF GLOBAL TOURS AND TRAVELS LTD WINDING UP CAUS ENO.43 OF 2000 (supra)** observed as follows:-

"…..the authorities show that in determining whether an alleged creditor has locus sandi to present a petition, the Court must answer the question whether the alleged debt is disputed on a substantial ground. If it is not he is a creditor. The debt need not be clearly and unequivocally admitted by the company. And a substantial dispute is not merely to be inferred from the affirmation of one party that there is a dispute and an affirmation to the contrary by the other party."

I entirely agree with the position taken by Ringera J. Accordingly I ask myself whether or not the alleged debt in the Application at hand is disputed on a substantial ground? The affidavit sworn by one Ignatius Obonyo a director of the Respondent in support of this application to strike out the petition does not dispute the debt due to the Petitioner. It merely alleges that the Respondent is able to pay the debt and had proposed to pay the same over a period of two years with effect from 15.7.2004. The said Affidavit further alleges that the Respondent expects business deals and has long term projects expected to generate revenue. No evidence of the alleged deals and projects is exhibited. It is clear therefore that there is no dispute on the Respondent's indebtedness to the Petitioner. Accordingly I hold that the Petitioner is a creditor within the meaning of Section 220(a) of the Companies Act.

I turn now to the challenge made by the Respondent against the Statutory demand served by the Petitioner upon the Respondent. The basis of the challenge is that the demand was not under the hand of the Petitioner as the same was issued by a firm of Advocates. A copy of the demand is annexed to the petition as "RN9". It was authored by M/S Kimondo Gachoka & Company Advocates who clearly stated that they were acting for the Petitioner. According to the Respondent the demand was not in accordance with Section 220 (a) of the Companies Act.

The Respondent believed it was fortified by the decision of Ringera J. in **KENYA CASHEWNUTS LTD –V- NATIONAL CEREALS AND PRODUCE BOARD (SUPRA**). With respect that decision dealt with a completely different set of circumstances. Besides, the challenge was considered at the hearing of the Petition itself and not at interlocutory stage. In my view an Advocate acting on the instructions of a company is competent to issue a notice under Section 220

(a) of the Companies Act. The validity of the demand in my view may be challenged by the instructing company but a debtor cannot defeat a petition on the basis that a demand was made by an Advocate whose authority is not challenged. I hold therefore that the Respondent served a valid Statutory notice under Section 220 (a) of the Companies act.

The Court of Appeal in **BRAHMBHATT –V- DYNAMICS ENGINEERING LTD (SUPRA)** held that in an application to strike out a Winding Up Petition the Court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail. My findings above show that on the evidence in the Application at hand the Respondent has not made out a plain and obvious case for striking out of the petition nor can I say that the petition is bound to fail. In the result I dismiss the Respondent's application with costs to the Petitioner. The petition should proceed to hearing

in the usual manner.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2005

F. AZANGALALA

JUDGE