REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
WC. CASE NO. 8 OF 2003

IN THE MATTER OF GILANI BUTCHERY LTD.

AND

IN THE MATTER OF THE COMPANIES ACT

RULING

The Petitioner herein is a Commercial Bank called Fidelity Commercial Bank Limited which lodged the Petition herein on 10th February, 2003 against the Respondent Company, Gilani Butchery Limited seeking an order, inter alia, that the latter company be wound up under the Provisions of the Companies Act, Chapter 486, Laws of Kenya. The Bank pleads that the said company is unable to pay its just and lawful debts and in the circumstances it would be just and equitable that it be wound up. This clearly invokes the provisions of section 218, 219, 220 and 221 of the Companies Act. The Petitioner had served a Notice on the company under section 220 demanding payment of Kshs.12,870.20 together with interest at the rate of 22% p.a. from 1st July, 2002. The Notice of 21 days was dated 2nd July, 2002 and stated that the amount was owing pursuant to an Agreement dated 27th June, 200. The notice period expired without payment of the amount claimed hence this petition.

The Respondent Company subsequently filed a Replying Affidavit in opposition to the petition sworn by one Mr. Mahedi Gilani, the Managing Director of the company and sworn on 19th May, 2003. The Bank to counter this opposition and strengthen its verifying affidavit filed an affidavit in Reply to the said Affidavit in opposition to the Petition. It was sworn by Mr. Sultan Khimji the Managing Director of the Petitioner Bank on 22nd May, 2003.

Before the compliance procedure under the Winding Up Rules were exhausted and in particular before the advertisement of the Petition in the Gazette or otherwise, the Respondent Company filed the present application before the court under Certificate Urgency. It was filed on 9th June, 2003 and initially proceeded ex parte when this court granted an order of stay of Further Proceedings of this case/petition including advertisement pending the hearing of this application Inter partes on 20th June, 2003.

As expected, the Petitioner filed a Replying Affidavit in opposition to this Application on 10th July 2003 sworn by Mr. Sultan Khimiji. This is the application before me now and which I finally heard Inter Partes on 19th May, 2004. In the course of its response and opposition, the Bank raised a question of Jurisdiction of this court. While this issue was to be raised as a Preliminary Objection on a point of law as indicated in a written Notice, the Petitioner chose to combine the said point in its submissions generally.

As jurisdiction is everything and goes to the court's entire decision, powers and mandate. I will deal with this issue at the outset of this ruling before delving in the merits of the substantive and/or factual issues raised. If this court has no jurisdiction to hear law the application then will be no use or capacity for the court to venture into any other question.

The Petitioner's Counsel Mr. Richard Kariuki submitted that the Notice of Motion herein is brought under Section 220 of the Companies Act and that under the said section there is no provision or procedure for the bringing of the present application. The Application before the court is headed Notice of Motion and is said to be brought under Section 220 of the Companies Act. There can be no dispute that section 220 does not provide for any procedure for the institution of any application. Section 220 defines what "inability to pay debts" as contemplated by section 219(g) means. So strictly, the Petitioner is correct in its objection to this extent. The question, therefore, is, is this defect, misdescription or improper invocation or reference to Section 220 fatal to the application? Does this go to the jurisdiction of the court? Mr. Musangi for the Respondent Company in response has referred the court to the Companies (High Court) Rules made under Section 344 of the Companies Act, Rule 202 (1) provides as follows:-

> ***"202 (1) No proceedings under the Act or these Rules shall be invalid by reason of any formal defect or any irregularity unless the court before which any objection is made to the proceedings is of the opinion that substantial injustice has been caused by the defect or irregularity an d that the injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court."***

The aforesaid provision speaks for itself and the effect is that no formal defects in proceedings under the Act or Rules may be invalidated only as a result of such defects or irregularities. The court is given a discretion to determine whether substantial injustice has been caused by the defect or irregularity and that the injustice caused, if any, cannot be remedied by the court. I have considered this and made an inquiry by perusing the pleadings and considering Counsel's Submission. I find that the citation or reference to section 220 was improper, however, I find and see no prejudice or injustice caused to or suffered by the petitioner as a result. The Petitioner knows exactly what case or claim it has to meet in the application. It has filed an appropriate Replying Affidavit which it has effectively put to use in this application. In fact, in its objection, the Petitioner did not state or disclose what prejudice or injustice it may have suffered due to this defect. I hold that the defect or irregularity is inconsequential and a mere misnomer. It does not go to jurisdiction.

Besides the foregoing, Rules 3 of the Companies (High Court) Rules provides as follows:-

> ***"3, Any proceedings brought under these Rules shall be deemed to be a suit within the meaning of the Civil Procedure Act and any Rules made thereunder, and the general practice of the Court including t he course of procedure and practice in Chamber; shall apply so far as may be practicable, except if and so far as the Act or these Rules otherwise provides"***

It is my humble view that by this provision, the Civil Procedure Act and Rules made thereunder do apply and may be invoked in so far as may be practicable EXCEPT in so far as the Companies Act or Companies (High Court) Rules otherwise provide. This means to me that provided the Application of the Civil Procedure Act and Rules were not expressly excluded or are inconsistent with the Companies Act and the Companies (High Court) Rules, then their provisions could be applied or invoked in Winding Up Proceedings.

I do not agree that Rule 203 of the Companies (Winding up) Rules affect the aforesaid interpretation and application. In fact if Rule 203 above is carefully read together with sections 344 of the Act, and Rule 3 of the Companies (High Court) Rules, one finds no inconsistency whatsoever. Rule 203 of the Winding Up Rules provides as follows:-

> ***"203 In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these Rules, the practice, procedure and regulatio n in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court."***

In my view this Rule does not exclude the application of Civil Procedure Act and Rules per se. There is no express ouster. By section 344 under which Rule 3 of the Companies (High Court) Rules were enacted by the Minister, the Rules and practice of the "Court" include the Civil Procedure Act and Rules. Of course this is unless the Companies Act and any of its Rules expressly exclude their application.

In this case, they do not. As a result, the Respondent would be entitled to invoke the provisions of Order 50, Rule 12 of the Civil Procedure Rules to cure the defect or irregularity of Misdescription or failure to state the correct provisions under which the application is brought. But this would really not be necessary in view of the express validation effect of Rule 202 (1) of the Companies (High Court) Rules referred to above.

In the light of the above, I do hold that this court has jurisdiction to hear this application and the defect or irregularity referred to is curable and/or has no adverse effect on the application.

It follows therefore that the court may now go into the substantive or aspect and merits of the Application herein. The questions for determination and which can be treated and determined together are summarized in or discernible from the grounds in support of the application:-

1. Is the alleged debt herein disputed on substantial grounds that it cannot form the basis of this Petition?

2. Is the Petitioner a Creditor to the Respondent within the meaning of the Companies Act and does it have the locus standi to bring this Petition?

3. Has the Respondent neglected or failed to pay any debt to the Petitioner.

4. Is the Petition brought in bad faith and with mala fides intent to bringing improper pressure to bear on the Respondent to pay a third party's.

5. Is this Petition the proper forum or proper legal proceedings of resolving the matters in difference between the parties i.e. resolving alleged disputed debts enforcement of agreements or interpretation thereof?

In the notice under Section 220 of the Companies Act, dated 2nd July, 2002 the Petitioner demanded a sum of Kshs.12,870, 747.20 from the Respondent being:

> ***- "… the a mount due owing and payable by you to us pursuant to the agreement dated 27 th June, 2002 together with accrued interest thereon as at 30 th June, 2002 full particulars of which are within your knowledge. The said sum continues to accrue interest at the rat e of 22% per annum from 1 st July, 2002 until payment in full……"***

The Respondent/Applicant produced a copy of the said Agreement in support of its application. It is my view that the said agreement constituents therefore, the crux of the case in this Petition. The terms, conditions and all contents in the said Agreement are relevant and must be closely scrutinized by the court when considering this Application. There is no dispute that indeed the Agreement was entered into between the signatory parties i.e. the Petitioner, the Respondent and the Guarantor Mr. Mahedi Gilani. The Agreement was made under seals of the 2 Companies.

Is the said Agreement proof of the debt demanded in this Petition and is there a debt in the first place? These are also pertinent questions. With regard to the point of law that the Agreement is binding on the Respondent and it cannot challenge its contentssince it was a deed under seal, I do hereby accept the Petitioner's Counsels arguments to **some extent.** The Respondent does not dispute that it entered into Agreement and indeed executed the same, under Seal. This means that strictly it is bound by its terms and conditions as a contract made between the parties. The Petitioner contended that the Agreement herein was a deed under seal, binding and enforceable as such. It is stated in **Halbury's Laws of England, 3d**

Edition, Vol.II at P.323 that an agreement signed by directors and sealed with Company's seal is not a deed since it has not been delivered.

This means that the Agreement in this case is a contractual document or contract and while it appears binding and enforceable, one party is entitled to raise the question of consideration.

In this case, the Respondent contends that it never received any money from the Petitioner and therefore, it cannot be a creditor for the purpose of winding Up. That the company did not borrow a single cent from the Bank. That there were various mutual obligations between the Bank and in Respondent. For instance, the Respondent states that it was required to deposit a certain amount of money with the Bank which was to constitute a Security for the Indebtedness of a third party, Gilani Butchery (Wholesale) Limited. That it deposited a total of Kshs.5.6 million which was to be held as a lien pending the Petitioner initiating recovery process against the Principal Debtor. The Respondent claims that the Petitioner in breach of the Agreement deposited the monies in the account of the Principal Debtor. That the Petitioner failed to meet its obligations under the Agreement despite reminders. The Respondent says that the undertakings by Gilani Burchery Limited were purely exgratia and devoid of consideration. The Respondent further claims that the Petitioner was in material breach of the Agreement as it has not accounted for the funds it has received from the Respondent.

The Respondent says that it has raised questions on the accounts of the principal debtor but the Petitioner was not supplied the same in breach of the Agreement. Respondent continues that it is not insolvent as a company and continues to trade and pay its just debts in the course of its day to day business. That the Petitioner has failed to take any substantive recovery measures against the principal debtor contrary to its own undertaking and this action of Winding Up the Respondent is premature and without any legal basis

. In response and opposition to the Application, the Petitioner inter alia states and contends:-

- That the Respondent undertook to pay to the Petitioner monies owed to the Petitioner by its sister company the Principal debtor in the event that the latter was unable to fully repay to the Petitioner monies owed by it under the Agreement dated 27th June, 2000, which undertaking the company has failed to honour.

- That the Petitioner has a right of lien over monies deposited by the company with it and could set off the same against the indebtedness of the Principal debtor. - That it has failed to meet its obligations under the said agreement and has in fact taken all possible and reasonable steps to fulfill its obligation

- That it has duly credited the principal debtors loan account with all monies received by the Petitioner in fulfillment of its obligations and there is still a substantial balance outstanding.

The aforesaid are only a portion of the responses given by the Petitioner. The Application is full of accusations and counter-accusations allegations and counter-a allegations on both sides. I have carefully perused the Agreement and the terms and conditions therein and the obligations of each party is clear. The court noticed the following facts and issues:

1. That under Clause 2.1.1. the Bank and its Receiver/Manager were to sell within an "Initial Period" of 90 days from the date of the Agreement, the Principal debtor's various goods and apply the proceeds of such sales so that a minimum amount of Kshs.6 million from the proceeds of such sales at the rate of kshs 2 million during every month of the "initial period" shall be remitted to the Account of the Principal debtor with the Bank during every month of the initial period and any surplus amount of the proceeds remaining thereafter would be paid to the Respondent or as it directs. The court finds that the Respondent contends that the Petitioner breached this condition by not selling the good as contemplated. The Petitioner claims that it did sell some goods but does not give particulars to demonstrate that there was compliance with the time set and whether the goods were sold within the "Initial period of 90 days"

2. Under Clause 2.2. The Bank was required to proceed with recovery action against the Principal Debtor and/or its other guarantors in the following manner:-

i) Sale of a property known as L.R. No. 1870/1/329, Nairobi for a minimum sum of Kshs.8,000,000/=. This property was not sold within the prescribed period of 90 days. They are conflicting allegations as to how and where the proceeds were finally applied.

ii) Sale of 2 motor vehicles, within the "Initial period" The Bank concedes that it never sold the 2 vehicles for various reasons. This clearly raises questions as to whether this amounts to a breach as contended by the Respondent. The Petitioner is the one which had the power to sell the vehicles and the vehicles in the control of the Manager. It should have known about the registration and title relating to the vehicles at the time of entering the Agreement.

3. Recovery Action against the Guarantors of the Principal Debtor, Mr and Mrs. Hirji, within the 90 days or initial period:- The Respondent claims that the Petitioner failed to prosecute the recovery process as it was obligated. The Petitioner claims that it filed suit which is still pending and being prosecuted.

From the foregoing facts and considering the Affidavits on record by all parties and the Counsel's submissions, I do hereby conclude that the existence of the debt in this matter and the quantum is a contentions and disputed matter. There are sharp conflicts of evidence on material facts. It has been said that a real dispute turning to a substantial extent on disputed questions of fact which require viva voce evidence cannot properly be decided on a Winding-Up petition.

In this case, there are many and substantial disputes relating to the performance of the Agreement herein. In my view, it is not the Agreement itself which creates the debt but also its performance by the 2 parties. The Obligations of each is tied to the performance of the obligations of the other. As of now there is dispute with regard to performance and even interpretation of the Agreement. As a result I hold that the Agreement taken against the contentious issues or disputes cannot constitute a debt the basis upon which the Petitioner can lodge and prosecute a Winding-Up Petition.

In the case of **MANN AND ANOTHER –V- GOLDSTEIN AND ANOTHER (1968)** 2 AL EIR 769 at p.773, justice Ungoed – Thomas stated:-

> ***"When the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should therefore ignore) and the company is solvent, the court will restrain the prosecution of Petition to wind up the company. As Sir Richard Malins V - C said in Cadiz Waterworks Co –v- Barnett (1874) LR 19 Eq at p.194). of a Winding -Up application,***
>
> ***"….. It is not a remedy intended by the legislature or that ought to ever be applied to enforce payment of a debt where the circumstances exist - solvency and a disputed debt……."***

Sir George Jessel M.R. in **Niger Merchants Co – V – Capper (1877) 18. CLD 557 at p.559** said:'

> ***"When a company is solvent the right course is to bring an action for the debt…"***

In this case, other than claim that the Respondent is unable to pay its debts, the Petitioner has not given or produced any evidence that the Respondent is insolvent to any extent or at all. The basis of the claim is the existence of the alleged debt herein. Now that the court has found that the debt is substantially disputed, then the question of insolvency in the absence of other concrete evidence does not arise. So to pursue a winding Up Petition in such circumstances, is an abuse of the court process.

In the case of **New Travellers Chambers Ltd –v- Cleese and Green (1874) 70 LT 271 at p.272**) Kekewich J. stated:

> "***Of course the question whether this is a debt or not may possibly be tried by a Winding Up petition, but it has been said over and over again that the presentation of a Winding Up petition is not a convenient and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt – if the question is not a mere question of quantum, but whether there is in fact a debt or not – a petition ought not to be presented and therefore the court ought to restrain the presentation of the petition."***

I am persuaded by the aforesaid statements and principles and I do apply them in this case. The debt alleged in this case has not been proven and is uncertain until and unless the Agreement is interpreted and the disputed facts determined by a court of law in a civil trial. At this stage this court cannot say that there is no debt but if it exists it is reasonably, if not substantially, disputed.

When it is clearly established that there is no debt, it follows that there is no creditor, that the person claiming to be such has no locus standi and that his petition is bound to fail (See Mann case at p. 769).

I do hold that in the present case as the petition is based on a debt which is disputed on substantial grounds the petitioner herein is not a creditor for the purpose of section 221 of the Companies act who has the locus standi requisite for the presentation of the petition.

From the foregoing, it would appear that the Respondent's fears and claims that this Winding Up petition is being used as a means of bringing improper pressure to bear on it may be justified. In the case of In **Re A Company (1894) 2 Ch. 349,** it was held that where a petition against a company is presented ostensibly for a Winding Up Order, but really another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process and will do so without requiring an action to be commenced, by restraining the advertisement of the petition and staying all proceedings upon it.

My conclusion is therefore that the Respondent is entitled to the reliefs sought herein on the basis of the reasons given above.

I do hereby strike out the petition as prayed in Order 3 of the Notice of Motion. The Respondent shall have the costs of the petition and this application.

Orders accordingly.

Dated and deliver at Nairobi this 22nd day of October 2004.

MOHAMMED K. IBRAHIM

JUDGE

22/10/2004

Coram: Ibrahim, J.

Court clerk: Buoro

Mr. Ochwo for Mr. Musangi for the Respondent/Applicant.

Miss Orieko holding brief for Mr. Kariuki for the Petitioner.

2.45 P.M.:

Ruling read in their presence.

Miss Orieko: I apply for leave to appeal.

Mr. Ochwo: No objection

Order: Leave to appeal is granted.

MOHAMMED K. IBRAHIM

JUDGE