



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS (NAIROBI)
CIVIL SUIT NO. WC 46 OF 1997
IN THE MATTER OF KENYA CASHEWNUTS LTD.....PLAINTIFF
VERSUS
NATIONAL CEREALS & PRODUCE BOARD.....DEFENDANT
JUDGEMENT

This is a petition by the National Cereals and Produce Board (NCPB) (hereinafter referred to as "the petitioner") to wind up Kenya Cashew nuts Company Limited (hereafter called "the company"). The petition was presented in court on 23.12.97. It is averred in the petition that as at 1st October 1997 the company was indebted to the petitioner in the sum of Kshs.74, 574,512.70. It is also averred that on the 8TH day of October, 1997 the company was given notice of intention to wind up under Section 220 of the Companies Act but it neglected to pay the same or any instalment thereof. The petition is made on the grounds that the company is unable to pay its debts and that in the circumstances it is just and equitable that the company should be wound up.

The petition was canvassed before me on 22.11.2001 and 7.2.2002. The company had not filed any affidavit in opposition to the petition. However, M/s Kilifi District Co-operative Union Ltd, a substantial shareholder to the company, had done so. Their affidavit was sworn by one Silas D. Mweri, the Union Secretary, on 24.9.98. The petitioner replied to that affidavit sworn by one Anne Gathoni Kamau, its legal officer, on 28th July, 1999 and filed in court on 29th July, 1999.

At the outset of the hearing, counsel for the petitioner objected to the affidavit in opposition to the petition on the ground that it had not been filed within 7 days of the date of the filing of the affidavit in verification of the petition contrary to rule 31 of the Companies (winding up) rules. He also asked for leave to rely on the affidavit made in reply to that affidavit. I overruled the objection on the ground that I did not see how in justice or procedure a party could be permitted to rely on an affidavit in reply to an affidavit which was sought to be struck out of the record. I held that both the affidavit in opposition to the petition, which was filed out of time, and the replying affidavit thereto should remain on record. Thereafter, the petition proceeded to hearing on the basis that it was supported by the affidavit of Anne Gathoni Kamau.

Counsel for the petitioner then proceeded to demonstrate from the affidavit in support of the petition that the company was indebted to the petitioner in the sum of Kshs.74,574,512.70. He submitted that as the company had not filed any affidavit in opposition to the petition, it must be taken that the debt was undisputed. He next pointed out that a demand under Section 220 of the Companies Act had been made. At this stage, I asked counsel where that demand had been exhibited as I did not see the same in the

supporting affidavit. He stated he had a file copy and he was ready to annex it in a further affidavit. He asked for an adjournment for the purpose of filing a further affidavit on the grounds that failure to annex the demand to the supporting affidavit was an inadvertent omission. Counsel for the Company opposed the application for adjournment on the grounds that the court had earlier on in the morning ordered the petition do proceed to hearing and the petitioner's counsel had indicated that he would rely entirely on the affidavit of Anne Gathoni Kamau. He submitted that that affidavit must be presumed to contain the whole case of the petitioner. Furthermore, he contended, no explanation had been given why the demand was not annexed to that affidavit or why a supplementary affidavit had not been filed for the express purpose of annexing that demand. Counsel for the petitioner replied that it was in the interest of justice that the petitioner be allowed to annex the demand. He also pointed out that the affidavit in opposition to the petition did not deny service of the notice. I held that in view of the fact that there was no affidavit by the company in opposition to the petition and service of the notice under section 220 was not denied, there was no utility in granting the adjournment. Counsel for the petitioner then submitted that in view of the fact that the petitioner's debt remained unpaid, the company was insolvent. He further submitted that as the company had not filed any affidavit in opposition to the petition, it cannot be heard to deny that it was indebted to the petitioner as claimed or that it was unable to pay its debts. He asked for the orders sought. Counsel relied on the case of **IN THE MATTER OF PARK ENTERPRISES LIMITED [WC CAUSE NO.50 OF 1993]** for the proposition that failure to file an affidavit in opposition to the petition had the same effect as failure to file a defence to the suit and accordingly the petition must succeed.

Counsel for the company on his part submitted that although he had not filed an affidavit in opposition to the petition, he was entitled to be heard in opposition thereto. He submitted that the winding up rules did not make it mandatory for the company or any party who wished to oppose a petition to file a replying affidavit. I ruled that there was nothing in the winding up rules to justify the proposition that a company which had not filed an affidavit in opposition to the winding up petition could not be heard: I took the view that a company which had not filed an affidavit in opposition to the petition could be heard on matters of law only. In my opinion although it is correct that failure to file an affidavit in opposition to a petition is like failure to file a defence to a suit, it does not inexorably follow that the company cannot be heard in opposition to the winding up or that the petition must inevitably succeed. Even in an ordinary suit, failure to file a defence does not, except in cases where liquidated demands are made, result in inevitable judgements. The suits are set down for hearing. In my judgement, where the company has not filed an affidavit in opposition to the petition, the petitioner must nonetheless proceed to prove the petition on the usual standard of a balance of probabilities and the company may, if it wishes, be allowed to oppose the petition on strictly legal grounds.

The company's opposition to the petition was on four grounds. First, that Section 220 (a) of the Companies Act had not been satisfied in that a proper notice had not been served on the company. Counsel for the company pointed out that no such notice was annexed to the affidavit of Anne Gathoni Kamau in support of the petition. He also contended that the letters and notices annexed to the affidavit as "AGK 19-20" cannot suffice as the notice under Section 220 (a) of the Companies Act. In that regard it was pointed out that "AGK 19" was not a notice. It was a letter to advocates. And "AGK 20" was not a letter under the hand of the company and in any case it gave only 7 days notice and not 21 days as required by the Act. Secondly, it was contended that a company could not be wound up on the ground that it was just and equitable to do so at the instance of a creditor. It was argued that this remedy is available only to shareholders. Thirdly, it was submitted that the affidavit in support of the petition had not disclosed the contingent and prospective liabilities of the company. It was contended that Section 220 (c) of the Companies Act requires that such liabilities be shown so that the court can consider them. It was argued that mere fact that there was a trade debt was insufficient to wind up the company. Fourth, it was submitted that the petition was an abuse of the process of the court for it was made for the purpose of recovering a debt. It was contended that winding up procedure was not available for recovery of debts.

Counsel for Kilifi District Co-operative Union also opposed the petition. He associated himself with the submissions of counsel for the company. In addition, he pointed out that according to the affidavit of Silas Mweri, the debt in question was disputed and a winding up order cannot issue in those circumstances.

Counsel for the petitioner replied to the above submissions as follows. The affidavit of Anne Gathoni

Kamau was filed in reply to the affidavit of Samuel Mweri. In the latter affidavit, service of the creditor's notice was not disputed. It was therefore inconsequential that the notice was not annexed to the affidavit of Anne Kamau. In any case, it was contended, that what the Act required was that a notice be served, not that it must be part of the affidavit. It was also submitted that the proper person to dispute the debt was the company, not an interested party. It was further submitted that if money in excess of Kshs.1,000 is demanded by a creditor and it is not paid within 21 days, the company's insolvency is established and the petitioner is entitled to a winding up order.

I have now considered the above submissions. The first issue is whether the company and the interested party can successfully oppose the petition on the ground that the requisite notice under Section 220 (a) of the Companies Act had not been served on the company. The service of a valid statutory notice under Section 220 (a) is a condition precedent to the success of a creditor's petition grounded on the company's inability to pay its debts. Now although neither the company nor the interested party denied receipt of the notice pleaded in paragraph 11 of the petition, the court must be satisfied that the notice served is a valid one for winding up a company is like passing a death sentence on an individual. It is a most drastic remedy. The court can only be so satisfied if it has the benefit of seeing the terms of the notice. In the instant matter, the terms of the notice served are neither set out in the petition itself nor is the actual notice annexed to the verifying affidavit. And no such notice is annexed to the supporting affidavit of Anne Gathoni Kamau. The annexures to that affidavit though described as demand letters and statutory notices are not the kind of demand letter or statutory notice envisaged by section 220 (a) of the Act. They are not under the hand of the company and they do not give 21 days notice. Moreover, they do not demand the amount of the debt alleged to be due. So although the company cannot be heard to say it was not served with notice, the petitioner has not shown that the notice served was a valid one within the contemplation of the law.

The second issue is whether or not in the circumstances of this case, the petition can lie on the ground that it is just and equitable to wind up the company. In my opinion a reading of paragraph 13 of the petition shows that this ground is invoked entirely for the reason that the company has failed to comply with a statutory demand and is therefore unable to pay its debts. In those circumstances, I am unable to hold that it is a ground unavailable to a creditor in the absence of a full argument on the issue. I would decline to dismiss the petition on that ground.

The third issue is whether or not it is incumbent on the petitioner to show the contingent and prospective liabilities of the company. From both the petition itself and the supporting affidavit of Anne Gathoni Kamau, it would appear that the petition was grounded on an alleged failure by the company to comply with a creditor's notice issued under the provisions of Section 220 (a) of the Companies Act. All that is required for the creditor to succeed in a petition based on the ground of inability by the company to pay its debts in those circumstances is to prove that the company has failed to comply with a valid statutory demand. He need not show the contingent and prospective liabilities of the company. However if the petition is grounded on the Company's alleged inability to pay its debts in circumstances other than those contemplated by paragraph (a) or (b) of Section 220, then the court is obliged to consider the company's contingent and prospective liabilities. That appears to me to be plain from a reading of Section 220 of the Companies Act. Paragraphs (a) (b) and (c) are obviously disjunctive and constitute three separate bases for inferring that a company is unable to pay its debts. The requirement to consider the company's contingent and prospective liabilities is only stated in paragraph (c). It has no application to either paragraph (a) or (b). This petition cannot therefore fail on the ground that the petitioner has not disclosed the company's contingent and prospective liabilities. I cannot dismiss the petition on that objection thereto.

The fourth issue is whether the petition is an abuse of the process of the court. It is clear from the petition itself that it was made on the ground that the company was unable to pay its debts. That cannot be an abuse of the process of the court. It would only be an abuse of the process of the court if the debt was ***bona fide*** disputed for in those circumstances the court would feel that its process was being used to coerce the company to pay disputed debts. I attach no importance to the fact that Anne Gathoni Kamau has deponed that the petition was presented as a means of recovery of a debt due to the petitioner. That deposition should be read in its proper context. In short I would not dismiss the petition on this ground.

The upshot of my consideration of the petition is that the same is dismissed with costs to the company and to the interested party on the ground that the petitioner has not proved that the company has failed to comply with a valid statutory notice in terms of Section 220 (a) of the Companies Act.

DATED at Nairobi this 27th day of February 2002.

A.G. RINGERA

JUDGE

COMPANY LAW

- Whether a company which does not file an affidavit in opposition to a winding up petition may be heard.
- Whether a petition in respect of which no opposing affidavit is filed must inevitably succeed.
- What petitioner for winding up a company for inability to pay its debts must prove.