



REPUBLIC OF KENYA

The Kenya Power & Lighting Co Ltd v Matic General Contractors Ltd
High Court Of Kenya At Nairobi December 8, 2000

Milimani Commercial Courts

T Mbaluto, Judge

Civil Case No. 1560 Of 2000

December 8, 2000 T Mbaluto, Judge delivered the following ruling

This application has been brought under Rule 3(2) of the High Court (Practice & Procedure) Rules and Order 39 Rules 2, 3 and 9 of the Civil Procedure Rules for the following substantive order:-

“The defendant, whether by itself, its agents or servants be restrained from presenting to court, advertising or howsoever in any way filing or taking out Winding Up Proceedings against the plaintiff in respect of a claim for Kshs 31,449,512.37 or in respect of any other claim the defendant may make against the plaintiff in any way whatsoever pending the hearing and determination of this suit and HCCC No 1326 of 2000 – Matic General Contractors Ltd versus The Kenya Power & Lighting Company Ltd.”

The application is based on the following grounds:-

“1. The defendant has on August 25, 2000 served on the plaintiff a Winding Up Notice in respect of a claim for Kshs 31,449,512.37 which claim is the subject matter of HCCC No. 1326 of 2000.

2. The plaintiff is the defendant in HCCC No 1326 of 2000 and has filed a defence bona fide disputing the defendant’s claim in that suit.

3. The defendant’s motive in serving the Winding Up Notice is malicious as it is aware that the debt is bona fide disputed.

4. The defendant is threatening to file a Winding Up Petition against the plaintiff purely to threaten, harass and otherwise coerce the plaintiff to pay a bona fide disputed debt which is the subject of a pending court case.

5. A Winding Up Petition should not be used to recover a disputed debt.

6. The plaintiff has offered a bank guarantee as security to the defendant.

7. The plaintiff is a substantial company and the sole distributor of electricity in Kenya.

8. The plaintiff will suffer irreparable harm if a Winding Up Petition is filed or advertised and there will be severe disruption of the plaintiff’s business.”

The facts of this matter are not disputed. On July 25, 2000, the defendant who is a contractor filed High Court of Kenya Civil Case No. 1326 of 2000 against the plaintiff, claiming, inter alia , Kshs 28,686,121

as moneys due for work alleged to have been done by the defendant. On August 15, 2000 the plaintiff paid Kshs 3,871,774 to the defendant being the amount plaintiff admitted to be due to the defendant. The plaintiff however denied the balance of the claim in the sum of Kshs 24,814,347 and filed its defence denying it. The defendant filed a reply in the suit on August 24, 2000 thereby joining issue with the plaintiff on the disputed amount of Kshs 24,814,347. That suit is still pending and has not come for hearing.

On August 23, 2000, the defendant gave the plaintiff a Winding Up Notice dated August 23, 2000 demanding payment of Kshs 31,449,512.37 within 21 days under section 220 of the Companies Act. Upon receipt of the notice, the plaintiff demanded the withdrawal of the Notice and even offered a bank guarantee in respect of the disputed amount but the defendant has refused to withdraw the Notice and also threatened to file the Winding Up Petition against the plaintiff. Two days before giving the Winding Up Notice, the defendant had written a letter dated August 21, 2000 with copies to all sorts of people and organisations including the Country Director, World Bank, several Chief Executives of banks, Embassies and other entities in which it alleged that the plaintiff was insolvent and unable to pay its debts.

The dispute that gives rise to the Winding Up Notice arose from a contract between the plaintiff and the defendant pursuant to which the defendant undertook certain jobs. The contract is not disputed. What is in dispute is the value of the work done. The defendant claims some Kshs 31,449,512.37 but the plaintiff contends that the figure is overstated and grossly distorted. The plaintiff contends that it has a defence to the claim. It therefore says that there is no justification for the Notice and that the Winding Up process is being used for improper motives. In order to demonstrate its good faith, the plaintiff has procured a reputable bank (Standard Chartered Bank) to issue an irrevocable guarantee as evidence of its willingness and readiness to pay any amount that may ultimately be found to be due and owing to the defendant.

The plaintiff also claim that the Winding Up Notice has been issued in bad faith. Evidence of that bad faith is the copying to various persons and organisations referred to above of the letter dated August 21, 2000. Mr. Kowade who represented the defendant in this application argued that it was not open to the plaintiff to say that there was no dispute; he submitted that there had to be a bona fide dispute. The basis of his argument was that the plaintiff could not challenge the defendant's claim after the same had been certified by the plaintiff's own engineers. Claiming that the application was premature, Mr. Kowade observed that what the court was being asked to do was to issue a gagging order.

The notice to Wind Up the plaintiff has been issued under section 220 of the Companies Act and the reason for the notice was given by the Managing director of the defendant as the plaintiff's inability to pay its debts. Inability to pay debts is defined in section 220 of the Companies Act as:-

“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; or

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.”

There is evidence in this matter that the plaintiff has procured the Standard Chartered Bank to give an irrevocable guarantee to the defendant undertaking to pay, in the event of the plaintiff being found liable to pay the said sum to the defendant. In my view, the guarantee at the very least, not only shows that the plaintiff is able to pay the debt but also goes far to disapprove the defendant contention that the plaintiff is

insolvent.

The problem involved in this matter is not so much the plaintiff's inability to pay the debt but rather the dispute about it. That there is a genuine and bona fide dispute between the parties is established by the fact that even before giving the Winding Up Notice the defendant had filed a suit being HCCC No 1326 of 2000, in which one of the remedies sought was the recovery of Kshs 28,686,121. In my judgment the filing of the suit is a clear acknowledgement by the defendant of the dispute. Because of that the dispute regarding the recovery of the sum of Kshs 28,686,121 by virtue of which the defendant deemed it necessary to action, the defendant cannot now be heard to say, as it attempts to do in this matter, that the debt of Kshs 28,686,121 or thereabout is not bona fide.

The plaintiff appears to have placed a lot of reliance on the fact that its claims were certified by engineers from the City Council of Nairobi and by the plaintiff's own engineers but as the plaintiff has averred despite all that it has an arguable defence to the defendant's claim. In his reply to Mr. Kowade's submission, Mr. Ngatia for the plaintiff made reference to the areas where specific items were disputed. These include the rates and the linear measurements of the area worked on. This is therefore not the type of debt that would justify invoking section 220 of the Companies Act. It is my opinion that it would be unfair and unjust and even oppressive to use the Winding Up process to recover a debt in circumstances obtaining in the instant case

Further, although the defendant claims that the plaintiff is insolvent, no evidence of insolvency was tendered. On the contrary, the fact that the plaintiff was able to obtain an irrevocable undertaking by the Standard Chartered Bank to pay to the defendant the sum of Kshs 28,686,121 clearly shows that the plaintiff was financially sound. In the case of *In Re Gold Hill Mines (1883) 23 Ch D 20* the Court of Appeal in England held:-

“that where a petition to wind up is improperly filed the court has jurisdiction on motion to stay all proceedings under it, or to dismiss it; that the present petition was an abuse of the process of the court, being brought to compel payment of a small debt which was bona fide disputed, and being unsupported by any evidence that the company was insolvent; that the petition therefore must be dismissed

.” Also in the same case *Bacon V C* stated:-

“The Act of Parliament has given a creditor who cannot get paid a right to present his petition against a company which not only refuses to pay him, but is in a state of insolvency. That is all the Act does. It does not countenance applications to wind up as a means of enforcing the payment of debts which the company dispute. Considering the amount of mischief which would be done to the company, if solvent, by a petition to wind it up by a creditor whose claim only amounts to £110 and is disputed, I have not the least doubt that I have full jurisdiction to restrain the proceedings.”

The same principle is stated in the case of *The Cadi z Waterworks Company v Barnett (1875) Vol 44 L J Ch 529* where it was stated:-

“It is thoroughly settled now that, on a petition to wind up, no order can be made until the debt is proved, where there is a bona fide dispute, as to its existence ... But if a man will present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bona fide disputed, and also when he knows that the company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the court, under those circumstances, would be, not to suspend the petition, but absolutely to dismiss it, with costs.

And my opinion is, that this court ought not, and, I think, will not at all events, I will not, until I am controlled by higher authority – permit the procedure under the winding up Acts to be made the vehicle of oppression”

Mr. Kowade for the defendant argued that the issue as to whether there is a debt and also whether there is a bona fide dispute can only be determined by the trial Judge after hearing oral evidence and cannot be resolved through affidavit evidence. That statement is of course, true as far as it goes. However, where by affidavit a party shows that there is a bona fide dispute as to the debt and the creditor is misusing the Winding Up process for sinister purposes, then this court would have the right to intervene and prevent the misuse of the winding up process. Accordingly, having carefully considered the circumstances of this case, I can see no justification for the Winding Up Notice. In my view, there was a sinister motive in the giving of the Winding Up Notice. Firstly there is a pending suit between the parties relating to the same debt which said suit was filed by the defendant. Instead of prosecuting that suit, the defendant has threatened to commence Winding Up proceedings against the plaintiff. As if that were not bad enough, the defendant has for no good reason told virtually everyone who matters in this country that the plaintiff is insolvent. Considering that the plaintiff is one of the biggest companies in this country with assets running into billions and that there has been no real evidence of insolvency, I have no doubt that the issuance of the Winding Up Notice was attended with malice for the purpose of scandalizing the plaintiff and thereby forcing it to pay a disputed debt. The action of the defendant was therefore oppressive and should not be allowed to continue. For those reasons, the application is granted as prayed in the application. The defendant will bear the plaintiff's costs of the application.