



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA-MILIMANI
COMMERCIAL & TAX DIVISION
WINDING UP CAUSE 21 OF 2005
IN THE MATTER OF KENYA BUS SERVICES LIMITED
RULING (3)

BACKGROUND

1. This Court took over the matter from L.J Ngetich who on 18th October 2018 heard the parties through their respective Counsel and directions were as follows; The Petitioner was to file a formal application to withdraw the Petition within 30 days. This would give opportunity to the [other]Creditors [to take up the Petition] Further mention was on 18th January 2019.
2. The Applicant/Claimant/Decree-holder filed Preliminary Objection to the Judgment/Debtor/Company 's Application of 20th May 2020 seeking stay of execution of the Judgment & Decree of 4th September 2012 & 29th September 2017 for Ksh 526,326,540/- in **ELC 68 of 2006 Transport & Allied Workers vs Kenya Bus Services** as there was/is Winding Up Petition against the Company pending.
3. On 7th August 2019, the Court delivered Ruling and dismissed the Preliminary Objection. The Winding up Petition was to be heard on a date to be obtained from the Registry. All Creditors were to be served. The pending application of 20th May 2020 was compromised by virtue of **Section 225 of Companies Act Cap 486 (repealed) that provides that execution cannot proceed upon commencement of the Winding up.**
4. The Applicant/Company filed Certificate of Urgency application dated 17th October 2019 seeking review of the Court's Ruling of 7th August 2019. The Court granted stay of execution in view of the pending Winding up Petition. The NTSC as why the Petition should not be dismissed was heard and determined before L.J Ngetich. The Court ordered the Petitioner to formally withdraw the Petition to enable other Creditors to take over.
5. By Ruling of 18th February 2020, the Court dismissed application for review. The orders of 7th August 2019 were to be complied with; to take a hearing date from the Registry after case management was conducted. In the meantime, **Section 225 of Companies Act (repealed)** remained in force.
6. The matter was mentioned on 1st February 2021 for directions. Mr Nyamu, Learned Counsel for the Decree-holder intimated the matter was ready for hearing since 2018 and the Company filed many applications. The Petitioner lost interest in the matter and applied the Petition be dismissed. The Company filed an application which was dismissed and the Company filed a Notice of Appeal. The request was for the matter to proceed for hearing.
7. Mr. Maillu, Learned Counsel for the Company sought orders allowing any other Creditor to step in as Petitioner and the Petition be set down for hearing. Then, an advertisement maybe published to all parties in the local media.
8. Mr. Nyamu Learned Counsel for Decree-holder replied that Creditors were served through the print media. The Petitioner BP Ky Ltd lost interest and relocated to UK. The matter has been in Court for 16 years now and directions were given on 16th August 2019.
9. The Court gave directions for the hearing of the Petition on 22nd February 2021 and since the Petitioner BP Ky Ltd was not interested in the matter anymore and there was no Creditor who sought or filed Petition on record to take over the Petition, if there was no Petitioner, the Petition ought to be dismissed.
10. The parties were to be served through advertisement and costs shared by the Company and Decree-holder.

COURT PROCEEDINGS

11. On 22nd February 2021, Mr. Nyamu, Learned Counsel for Decree-holder informed the Court that service by advertisement was not done as the notice to do so was sent very late, Therefore the Decree-holder served Parties/Creditors through their advocates. This was evidenced by Affidavit of Service filed online/e-filing on 19th February 2021. The parties' advocates served were;

- a) Singh Gitau Advocates
- b) Mulwa & Co Advocates
- c) Wanaina Ireri Advocates
- d) Sarva & Pallan & Co Advocates
- e) Muriu Mungai Advocates

12. The Decree-holder confirmed service of Certificate of Urgency application Anne W. Kimani T/A Anne Kimani & Co Advocates to be enjoined as a Supporting Creditor. Due to service on 18th February 2021, Counsel registered reservation to the application as 14 of the Invoices annexed to the Application some referred to Bus Track Ltd but were all sent to Kenya Bus Service Co Ltd.

13. The Applicant in paragraph 8 deposed that the Applicant was not aware of the Winding Up proceedings until she saw the advertisement in print media. The Decree-holder objected to the Applicant's assertions that no advertisement was carried out. This fact was concocted to stop parties enjoy fruits of their judgment. The decree-holder submitted he has undergone a frustrated journey due to delay and intended actions to defeat the ends of justice as there has been objection to withdrawal of the Petition to ensure protection of Company's assets under **Section 225 of Companies Act Cap 486** (repealed). For these reasons the decree-holder objected to joinder of the Applicant as Support Creditor to the Petition.

14. Mr Mwangi, Learned Counsel for the Applicant confirmed that he filed Certificate of Urgency on behalf of his client on 18th February 2021 seeking to be enjoined as a Supporting Creditor.

15. The Certificate of Urgency Application was filed online/e-filing on 18th February 2021. The Applicant deposed that the Law Firm was retained to render legal services to the Company on diverse dates between 2003-2008 and the Company accumulated various Bills of Legal Fees unpaid up to date.

16. Despite rendering Invoices, Final Fees Notes and/or Certificates of Taxation of Costs the same remain unpaid to date.

17. The Applicant sought to be enjoined in the present Insolvency proceedings as a Supporting Creditor so that the Applicant proves its debt and stake.

18. The Certificate of Urgency was accompanied by Notice of Motion brought under **Part VI, VIII, IX, X Sections 384 & 730 of Insolvency Act 2015, Part X of Insolvency Regulations, Order 51 Rule 2 CPR Section 3A CPA** and enabling provisions of the law and sought that the Court orders Anne W. Kimani & Co Advocates to be enjoined in these proceedings and be allowed to participate in the proceedings as Supporting Creditor.

19. The Applicant's Supporting Affidavit there are annexed and marked **NMM-1** bundle of various Invoices totaling Ksh 990,890/-with interest; There is also annexed **NMM-2** Demand Notice to Kenya Bus Service Co Ltd of 18th September 2008.

20. The Applicant reiterated that KBS ceased operations and affiliate Companies took over the buses operated personally by KBS. The Applicant was unaware of the Winding Up Cause until advertisement in the local Daily.

21. Mr Peter Munge, Learned Counsel for Petitioner submitted that joinder to Winding Up Proceedings was not automatic, the Applicant must establish a *prima facie* case. The Petition was filed in 2005, no reasons were advanced to explain why the Applicant failed to seek to be joined then until now. Paragraphs 3 & 4 the Applicant applied for legal fees for legal services rendered in 2003-2008. In support of that the Applicant annexed Invoices and not Certificate of Taxation. Under **Limitation of Actions Act**, the Applicant's claim is statute barred and it will be of no relevance for the Applicant to be enjoined. If the Applicant filed Bill of Costs and it was taxed then and it would have been valid for 12 years. Equity does not support the indolent as the Applicant slept on its rights.

22. The Applicant's Counsel sought to reserve the right to respond to the objections raised with regard to joinder; the issue of Invoices referring to Bus Track Ltd and not KBS Co. Ltd.

23. The Court found that at that stage the Applicant could not be enjoined as a *prima facie* case was not established. The matter was scheduled for hearing of the Petition, the advertisement was carried out in 2019 and this time service was to each of the Creditors through their advocates' firms and is confirmed by Affidavit of Service was filed.

24. Mr Munge, Learned Counsel for the Petitioner informed the Court that the Petitioner Kenya Shell Ltd formerly BP Ky Ltd filed Petition for Winding Up Kenya Bus Services in 2005 and thereafter agreed to withdraw the Petition in 2007. He stated that in the event, the Company denied this fact, he was willing to provide the correspondence on Without Prejudice basis to stop and withdraw the petition with no orders as to costs.

25. Mr. Maillu Learned Counsel for the Company informed the Court that it was not fair for the Petition to be heard in the absence of advertisement. As Assisting Counsel, he wrote to the Decree-holder's Advocate Mr. Nyamu on sharing advertisement Fees vide letter of 16th February 2021. He delayed in pursuing the advertisement as Counsel, Mr. Singh was indisposed. They did not hear from the Decree-holder's advocate on advertisement and the Petition would be dismissed if there was no concurrence on advertisement.

26. Mr Maillu, Learned Counsel for the Company supported the Applicant's application on joinder and that Creditors could be allowed to take over the Petition as all parties are entitled to access justice. The Petitioner was also to avail correspondence that the Petition was withdrawn in 2007.

27. Mr. Nyamu, Learned Counsel for Decree-holder supported the Petitioner withdrawing the Petition. Advertisement was done in 2019 as ordered by this Court and Creditors had not come to Court to date. The Court was to proceed with the Petition as Advertisement was done in 2019. There is the Overriding Objective by **Section 1A 1B & 3A CPA** to expedite this old matter. The plight of 425 employees who have judgment as Decree-holders and the decree emanates from judicial authority exercised under **Article 159 COK 2010**. The Company ought to be happy that the Petitioner abandoned its claim by withdrawal of the Petition.

28. The Court then stopped the proceedings to allow each party file response(s) to the Applicant's application and exchange submissions. The Court was/is to deliver Ruling on whether there was/is a Petition or not. To date (24th April 2021) on line on e-filing portal none of the parties filed any pleadings and/or submissions.

DETERMINATION

The issue(s) for determination are;

1) Whether the Applicant may join the proceedings as Supporting Creditor

2) Whether there is a petition or not for proceedings to commence.

1. Whether the Applicant may join the proceedings as Supporting Creditor

29. The Applicant filed certificate of urgency Application on 18th February 2021 and sought to be enjoined a Supporting Creditor to these proceedings. The annexures to the Application indicate legal fees claimed for legal services was rendered for and on behalf of the Kenya Bus Company Ltd and Bus Track Co. Ltd but all were sent to Claims Manager KBS Ltd.

30. The Demand Letter of 18th August 2008 tabulates the claim of Ksh 990,890/-. The Applicant made a demand of the said amount within 14 days and confirmed that it would proceed to tax the Bills of Costs and thereafter proceed to execute the claim.

31. From 2008 to date, the Applicant's claim is statute barred as the same was not pursued within 6 years as is required under the **Limitations of Actions Act**. The Applicant deposed that it annexed certificate of taxation, such certificate is not annexed to the application on e-filing. So that whereas the Applicant may be a Creditor, there is no *prima facie* case for the following reasons;

a) Whether the legal services rendered to KBS Co Ltd and/or Bus Track Ltd which is a separate legal entity and was liquidated by Hon. L.J Kasango.

b) The Applicant did not lodge its claim in this matter in 2005 or shortly thereafter as evidenced by Company's application filed in this Court on 20th May 2019 and annexed is **EMM2**. The Applicant is not in the list of Parties Attending Hearing of the Petition and Notices of Intention to Appear in Petition. The Applicant is also not listed amongst the 221 Creditors/Interested Parties listed in **Misc Civil Suit 413 of 2005**.

c) The Bill of Costs was not taxed as required under **Section 51(2) of Advocates Act and Rule 2 & 11 of Advocates Remuneration Order** so as to obtain Certificate of Taxation a valid judgment for execution within 12 years.

d) The Applicant deposed that it was aware of these proceedings vide advertisement in the local daily. The advertisement was on 24th October 2019 in Daily Nation page 46, a copy is annexed to the Decree-holder's Affidavit of Service of 28th October 2019. The Applicant has not offered any explanation why it took almost 2 years to file the instant application from the last advertisement in 2019.

32. The **Limitation of Actions Act Section 4** provides;

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

.....

(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, ...

.....

33. For the above reasons and legal provisions the Applicant's application is statute barred, the claim ought to have been pursued by 2013 and if judgment/Certificate of Taxation of Bill of Costs was obtained it would be enforced within 12 years from the date of Certificate of Taxation. The Applicant's application of 18th February 2021 is dismissed and the Applicant may not be enjoined to these proceedings.

2) Whether there is a petition or not for proceedings to commence.

34. In the case of; ***Lorna Amimo vs Ruke Engineering Works Ltd Winding Up Cause 44 of 2015 [2019] eKLR*** it was held, the Petitioner who would apply for liquidation ought to serve a 21day Notice on the Company at its registered office in compliance with now **Section 384(1) Insolvency Act** which provides; a company is unable to pay its debts—

“(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor.”

35. Clearly, both under the **repealed Companies Act** and now **Insolvency Act**, service of statutory demand is a condition precedent to commencement and possible success of Creditor's petition for liquidation grounded on the Company's ability to pay its debts.

See also: ***Kenya Cashewnuts Ltd vs National Cereals & Produce Board [2002] eKLR & In Re Kipsigis Stores Ltd [2017] eKLR***

36. The process of initiating compulsory Winding Up is set in motion by filing of a petition that must be served to the Company and other parties and must be advertised.

In the instant case, the Winding Up Petition was filed by BP Ky Ltd to Kenya Bus Co Ltd on 24th June 2005 and served on the Company on 30th June 2005 for Ksh 103,888,407/- debt.

37. The Winding Up Petition was published in Kenya Gazette on 15th July 2005 and advertised in Daily Nation on 8th July 2005 and recently on 24th October 2019 in Daily Nation.

38. The Petition was scheduled for hearing on various dates. On 18th October 2018, the Petitioner was to file formal application to withdraw and did not. On 28th January 2019, this Court extended time to allow the Petitioner with draw from the matter, the Petitioner failed to withdraw the Petition. On 7th August 2019 parties were to take a date for hearing of the Petition, it was stayed due to an application for review of the Court Ruling of 7th August 2019. On 18th February 2020, this Court granted orders to parties to pursue Case Management and take a hearing date of the Petition from the Registry. They did not comply. On 22nd February 2021, the Petitioner represented by Counsel Mr. Munge informed the Court that the Petitioner abandoned and/or withdrew the Petition in 2007.

39. The Company contests this fact. The fact that the Decree-holder served all Creditors as confirmed by Affidavit of Service filed on 19th February 2021 was not contested. The Petitioner's Counsel informed this Court that they had withdrawn the petition in 2007 and if this fact was contested he could produce correspondence to prove this fact within 24 hours. Furthermore, the Petition was for hearing on 22nd February 2021, the Petitioner was not intent on prosecuting the Petition.

40. The legal position vide **Section 107-109 Evidence Act** is that he who alleges bears/discharges the burden of proof. The Petitioner shall prove that the Petition was withdrawn in 2007 as alleged and promised to furnish cogent evidence of this fact. So that if proved all proceedings from 2007 will have been rendered null and void.

41. On 18th October 2018, the Court granted the Petitioner 30 days to formally by application to be filed in Court to withdraw the Petition. Subsequent mention dates were granted and the Petitioner did not comply so as to pave way for other parties/Creditors prescribed under **Section 425 of Insolvency Act** to take up the Winding Up process as provided hereinbelow;

(1) An application to the Court for the liquidation of a company may be made any or all of the following:

(a) the company or its directors;

(b) a creditor or creditors (including any contingent or prospective creditor or creditors);

(c) a contributory or contributories of the company;

(d) a provisional liquidator or an administrator of the company;

(e) if the company is in voluntary liquidation—the liquidator.

42. The Company was to be served with the Statutory Notice now under **Section 384 of Insolvency Act** and if after 21 days payment of outstanding debt was not effected then the liquidation process would commence. Suffice is that the Petitioner's Counsel was duly served and appeared in Court to withdraw or proceed with the petition and/or confirm it was withdrawn in 2007 or to formally withdraw the Petition.

43. The Petition has been pending hearing and determination for 16 years now to the detriment of Creditors who still are intent on pursuing their debt from the Company. In the meantime, assets have dissipated as management and personnel changed over the years. The Creditors only hope is in hearing of the Petition in realizing their legal claims from the Company's assets after years of litigation. Therefore, the justice of the case demands expedition of resolution of the pending issue(s) as mandated by **Section 1A 1B & 3A CPA and Article 159 COK 2010**.

44. These provisions provide that the Court is to apply the overriding objective to facilitate just expeditious proportionate and affordable resolution of disputes. The duty of the Court is to ensure, just determination, efficient disposal, efficient use of resources and timely disposal of proceedings.

45. Therefore, whereas the **Companies Act 2015 & Insolvency Act 2015** are the substantive law in this dispute, the **Civil Procedure Act & Rules 2010** are the procedural law applicable in all civil matters.

DISPOSITION

46. Taking into consideration the inordinate delay in hearing and determination of the Petition which has adversely affected parties rights, the Court takes the following legal steps;

47. The Petitioner shall provide the Court and Parties through the Deputy Registrar Commercial & Tax Division physically or online through e-filing evidence of withdrawal of the Petition in 2007 or file formally to withdraw the Petition within 30 days of reading the Ruling to Parties/Counsel.

48. The Decree-holder obtained decree in 2013 and since then these proceedings have hindered execution by **Section 225 of Companies Act (repealed)** and now **Section 430 of Insolvency Act** which provides;

“If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void.”

49. The Company assets are preserved for the settlement of undisputed and proved of debts/claims by Creditors and their rank/priority to the Company's assets in payment of debts.

50. Hence it is mandatory that the hearing of the Petition facilitates such forum for Claimants to establish their claim, ranking and priority. The Creditors rights cannot be held in abeyance indefinitely in the interest of justice.

51. In default, the Petition shall proceed for hearing after 30 days of reading Ruling to parties/Counsel on 14th June 2021.

If the Petition is not withdrawn, Creditor replaced on the matter of hearing of the Petition on 14th June 2021, after 30 days from reading the Ruling.

By virtue of **Order 17, Rule 1 CPR 2010** which provides;

“Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment”

Order 17 Rule 2 (4) CPR 2010 which provides

The court may dismiss the suit for non-compliance with any direction given under this Order.

Order 17, Rule 4 CPR 2010 provides;

“Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith.”

The suit shall stand dismissed for want of prosecution.

52. If then, the Petition is not heard on the said date barring any unforeseen circumstances, then the same shall stand dismissed forthwith under **Order 17 (4) CPR 2010**.

DELIVERED SIGNED & DATED IN OPEN COURT ON 11TH MAY 2021

(BY VIRTUAL CONFERENCE DUE TO CORVID19 PANDEMIC LOCKDOWN FOR 30DAYS FROM 26TH MARCH 2021 &

CT'S ANNUAL LEAVE ENDING 5TH MAY 2021)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. ONYANGO H/B MAILU FOR THE COMPANY

MR. NYAMU FOR THE DECREE-HOLDER

COURT ASSISTANT - GRACE