



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E161 OF 2019

UTILITY GROUP KENYA LIMITED.....PETITIONER

VERSUS

UPLANDS PREMIUM DAIRIES & FOODS LIMITED.....RESPONDENT

RULING

Background

1. The Petitioner herein, **Utility Group Kenya Limited**, filed a petition against the Respondent (hereinafter (“**the Company**”) on 19th December 2029 seeking the following orders: -

- a. The Company be liquidated by the court under the provisions of the Insolvency Act 2015.**
- b. The court appoints the Official Receiver who is an authorized Insolvency Practitioner as the Provisional Liquidator.**
- c. The costs of this petition be granted to the petitioner and be paid out of the Company’s assets; and**
- d. Such other order may be made in the circumstances as the court shall deem just.**

2. The petitioner’s case is premised on the grounds that the Company is justly and truly indebted to it in the aggregate sum of Kshs 3,248,466 (hereinafter “**the Debt Amount**”) in respect to the supply of automotive oil (diesel) pursuant to a contract dated 21st June 2019.

3. The petitioner states that the Company has not heeded any of its requests and statutory demands for the payment of the Debt Amount and that the amount owed is within the prescribed insolvency level in accordance with the Insolvency Act.

4. The Company opposed the petition through the Replying Affidavit of its General Manager **Mr. Francis Nganga Waweru** who avers that the Company is solvent with an annual turnover of over kshs 1.8 billion and therefore has adequate ability to settle the debt.

5. He confirms that the Company entered into a contract with Petitioner for the supply of diesel valued at kshs 2,513,334 which amount was duly and fully paid but that the petitioner demanded the payment of Kshs 735,132 for “**escalated interest**”.

6. He contends that their contract did not make any provision for “**escalated interest**” and that there is no justification for the said “**interest**” or the filing of this petition.

7. He further states that the Petitioner should explore other forums to prove its entitlement to the alleged additional payments sought before filing this petition. He further avers that as at the time of filing this petition, the Company was not indebted to the Petitioner and that the company is able to pay its debts.

Application dated 11th March 2020.

8. Through the application of 11th March 2020, the Company seeks, *inter alia*, orders that the petition be struck out with costs.

9. The application is supported by the affidavit of the Company's General Manager **Mr. Francis Ng'ang'a Waweru** and is premised on the same grounds as those advanced in opposition to the petition.

10. The Petitioner opposed the application through the replying affidavit of its advocate **Mr. Wangila Waliaula** who states that the Debtor's application is a frivolous attempt to short-circuit the substantial issues emanating from the petition.

11. He states that the inadvertent error in the advertisement of the petition is not fatal and did not prejudice the Debtor. He further states that the Debtor has not provided any proof that the debt is unascertained and has not presented any evidence to show that the Debtor is solvent.

12. He further avers that the application is a regurgitation of the grounds presented in opposition to the petition in which case, the issues raised in the application can be canvassed at the hearing of the petition.

13. Parties canvassed the application by way of written submissions which I have considered.

14. The main issue for determination is whether the applicant has made out a case for the striking out of the Insolvency Petition.

15. It was not disputed that the petitioner and the applicant herein had a contract for the supply of diesel costing Kshs 2,518,834. It was further not disputed that the applicant paid the full sum of Kshs 2,518,834 for the diesel supply as shown in the applicant's annexure marked **"FN3"** to the affidavit in support of the instant application.

16. At paragraph 12 of the Petitioner's reply to the affidavit in opposition to the Insolvency Petition, the Petitioner's deponent states as follows:

"That it is only after repeated indulgence by the Petitioner in the period from 21st August through to 19th month of December that the debtor finally managed to pay the amount of Kshs 2,518,334/- as opposed to the accumulated indebted sum of Kshs 3,248,466/- as at the time of filing the said petition, which amount was to include the late payment interest charge, to cater inter alia for the lost opportunity cost and business disruption. The payments were therefore applied by the petitioner, as is customary, to settle the late payment interest charge first, leaving unsettled and remaining owing to the petitioner on the invoice amount Kshs 730,132."

17. The Petitioner concedes that the payments made by the applicant were applied to settle late payment interest charge leaving a balance of Kshs. 730,132.

18. From the above foregoing uncontested facts and from the Petitioner's own averments at paragraph 12 of the replying affidavit, it is clear that as at 19th December 2019 when the instant petition was filed, the applicant has already paid the sum of Kshs 2,518,334 to the petitioner. I therefore find that it is incorrect for the petitioner to claim that the debt amount is Kshs 3,248,466 only to turn around, during submissions and on filing the further affidavit, and claim that the amount due is Kshs 729,632 on account of interest. The applicant disputed the Petitioner's claim on interest on the principle debt and argued that their contract did not make any provision for interest. I have perused the contract signed by the parties herein and I note that it did not make any provision for the charging of interest on the value of diesel supplied or escalated interest as has been alleged by the petitioner. Indeed, the applicant maintained that the claim for interest at the alleged rate of 4% per week from the date of default was not agreed upon.

19. Having found that the principle debt of Kshs 2,518,334 was fully settled and that the claim for sum of Kshs 729,632 is a disputed amount allegedly charged on interest, I find that the said debt is disputed on genuine grounds that the interest claimed did not form part of the terms of the agreement. In other words, the petition herein is founded on a disputed debt which ought to be pursued at a different forum or suit for the said claim. I am guided by the decision in *Remits Electrical Company Ltd* [2015] eKLR where Ochieng J. cited Halsbury's Laws of England, 4th Edition and held: -

"A winding up order may not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on a substantial ground.

..... if the debt is genuinely disputed on some substantial ground, the court may decide this question on the petition, but it will usually dismiss a petition grounded in a disputed debt and leave the dispute to be decided in an action (at claim)."

The Judge went on to hold as follows: -

"In a nutshell, when there is a genuine and substantial dispute about the debt which is the foundation upon which a winding up petition is founded the court may stay or may dismiss the petition."

The learned Judge further cited Re: GoldHills Mines [1883] Ch. D 20 as follows: -

"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 windup as a measure of enforcing the payment of debts which the company disputes."

20. Courts have taken the position that winding up proceedings are not for the purposes of deciding a disputed debt (see *Re Spenser Kenya Ltd* [2016] eKLR.

21. In the present case, I find that there is a bona fide dispute regarding the issue of interest charged, by the petitioner, on the principle debt. I further find that no order can be made until the debt is proved.

22. The petitioner argued that the application is ill-timed and does not meet the threshold of a Preliminary Objection as envisaged in case of *Mukhisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696. I am however of the view that owing to the undisputed fact of payment of the principle debt prior to the filing of the petition and considering the fact that the claim on interest is disputed, I find that the motion to strike out the petition is merited and I therefore allow it with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. S. N. Nganga for the company/applicant

No appearance for petitioner.

Court Assistant: Sylvia.