



REPUBLIC OF KENYA



KENYA LAW
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**Polytanks Limited v Proto Energy Limited & another (Insolvency Cause 16 of 2018)
[2021] KEHC 219 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 219 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 16 OF 2018
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

POLYTANKS LIMITED PETITIONER

AND

PROTO ENERGY LIMITED 1ST RESPONDENT

SNETOR CHIMIE 2ND RESPONDENT

RULING

1. The Petitioner (“the Company”) filed the petition dated 24th April 2018 following a resolution by the board of directors on 9th March 2018 to wind it up on the ground that it had ceased operations when its plant and assets were taken over by Guaranty Trust Bank (Kenya) Limited and that it was insolvent and unable to pay its debts.
2. On 9th November 2020, the court dismissed the petition for want of prosecution and non-attendance by the petitioner. This has caused the Company to file a Notice of Motion dated 17th March 2021 seeking to set aside the dismissal order. The application is supported by the affidavit of a director of the Company, Derrick Correa, sworn on the same day.
3. The application is opposed by two creditors. Snetor Chimie has filed grounds of opposition dated 13th May 2021 and a replying affidavit of his advocate, Mercy Njuguna, sworn on the same day. Proto Energy Limited has filed grounds of opposition dated 17th May 2021. The parties filed written submissions supplemented by oral submissions by their respective counsel.
4. The main reason proffered by the Company for failure to attend court is that its former advocates, Eliakim Owalla and Company Advocates did not attend court to its detriment. The Respondents oppose the application on several grounds; that the application has been brought after undue delay,



that there are no enabling provisions that empower the court to entertain this application and that the Company has admitted indebtedness and it would not be in the interests of justice to allow the application.

5. I have considered the arguments and I take the following view of the matter. As regards jurisdiction to entertain the application to set aside the dismissal order, I hold that the court always has inherent jurisdiction to do justice or to prevent an abuse of the court process where a particular rule of procedure is absent. As this is a liquidation petitioner, it is governed by the provisions of the *Insolvency Act*, 2015 and under section 423(1) of thereof, the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya and in that regard, it states that:

427 (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:

- (a) an order dismissing the application;
- (b) an order adjourning the hearing, conditionally or unconditionally;
- (c) an interim liquidation order; or
- (d) any other order that, in its opinion, the circumstances of the case require.

6. Although the aforesaid provisions seem to suggest that the court can only exercise those powers at a hearing, the inherent power of the court to entertain any interlocutory application which is incidental and ancillary to the jurisdiction to “supervise liquidation” cannot be gainsaid. The power to entertain applications other than the hearing of the petition is an inherent and necessary power of the court to do justice to the parties and to prevent an abuse of the court process. In *Re Ukwala Supermarkets Limited* [2019] eKLR, Kasango J., expressed the view that:

In any Petition brought for the purposes of liquidating a Company, the Court has the discretion, once the Petitioner has established a right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein, the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.

7. In *Synergy Industrial Credit Ltd v Multiple Hauliers (EA) Ltd* ML HC COMM IP No. E010 of 2020 [2020] eKLR, I took the following position:

I would even go further and hold that “hearing of a liquidation application” under section 427(1) of the Act encompasses the hearing of interlocutory applications, giving directions and doing all things that go into processing the liquidation application to its conclusion. The fact that the court can entertain an interlocutory application does not deprive the parties to the right to a fair hearing. Even at that stage, the court is obliged to give the parties an opportunity to present their respective positions. In this case, the creditors, both opposing and supporting, have filed depositions and submissions stating the positions in response to the application. I therefore find and hold that the court has jurisdiction to entertain the Company’s application.

8. There is no doubt therefore that this court has jurisdiction to entertain the application to set aside a dismissal order even in the absence of any rule in that regard. Turning to the substance of the application, the question is whether the court should set aside the dismissal order. It has been held on several occasions the discretion to set aside a dismissal order is intended to avoid injustice or hardship (see *Patel v E. A. Cargo Handling Services Limited* [1974] EA 74). In exercising discretion, the court



ought to consider several factors including the conduct of the parties, whether there has been delay, whether the non-attendance was deliberate or inadvertent, the prejudice occasioned to the other side and whether costs will compensate the aggrieved party.

9. I am also alive to the fact that these are insolvency proceedings hence the court must bear in mind the overall objective of the *Insolvency Act* set out in section 3(1)(c) thereof as follows:

3(1) The objects of this Act are-

(c) In the case of insolvent companies and other bodies corporate whose financial position is redeemable-

- i. enable those companies and bodies to continue to operate as going concern so that ultimately they may be able to meet their financial obligations to their creditor in full or at least to the satisfaction of those creditors; and
- ii. to achieve a better outcome for the creditors as a whole than would likely to be the case if those companies and bodies were liquidated.

10. I accept the petitioner has been let down by its advocates and would allow the application on that ground. I do not think a party should be punished for the mistakes or inadvertence of its advocates (see *Philip Chemwolo v Augustine Kubende* [1986] eKLR).

11. The Company declared that it was insolvent in 2018. It cannot be allowed to continue carrying on business without accountability to the court and to its creditors, who have been waiting since 2018 to resolve their debts. Further, on 22nd October 2020, the Company, Proto Energy and Snetor Chimie recorded a consent where the Company admitted indebtedness to the two creditors and in particular, it was agreed

(3) THAT leave be and is hereby granted to the Petitioner/Debtor to furnish the court with the account of inventory and proceeds of sale of machinery held by Prime Bank Limited, within 21 days of today's date and the same be furnished to the court by means of a supplementary affidavit.

12. By the time the petition was dismissed, the Company had not complied with the order. The creditors claim that the directors of the Company have not paid their debts and were preferring other creditors to their detriment. In the absence of the petition, the directors cannot be called upon to account. It is in the interests of the Company and body of creditors for the directors to be called to account.

13. I therefore allow the application dated 17th March 2021 on the following terms:

- a. The dismissal order made on 9th November 2020 be and is hereby set aside.**
- b. The Directors of the Petitioner are hereby directed to file in this court a list of all the creditors, assets, liabilities and annual accounts since 2018 to date within 14 days from the date hereof.**

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.



Ms Muhoro instructed by Wanyanga and Njaramba Advocates for the Petitioner/Company

Mr Kihang'a instructed by Mwangi and Kihang'a Advocates instructed by Proto Energy Limited.

