



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
INSOLVENCY PETITION NO. 17 OF 2018
IN THE MATTER OF GENGHIS CAPITAL LIMITED
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
AND
IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015
RULING

1. King County Limited (King) and Muriithi Wanjau (Wanjau) have petitioned for the Liquidation order to be issued against Genghis Capital Limited (the Company) and an interim Liquidator to be appointed over Genghis Capital Limited it.
2. The Petition was preceded by two statutory letters of demand, dated 8th and 15th March 2018. The demands were as required by Section 384 of the Insolvency Act No. 18 of 2015, which provides:

“(1) For the purposes of this Part, 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;

(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 as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company’s assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

(3) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).”

3. This Ruling relates to the Notice of Motion application dated 3rd July 2018. The application is filed by the company. The prayers sought is:

The petitioner’s petition filed on 16th May 2018, together with the statutory Notices of the petitioners dated 8th March and 15th March 2018, be struck out.

BACKGROUND

4. According to the Company’s Chief Executive Officer, the company offers various licensed services, such as investment banker, which includes stock brokerage services, fixed income securities investment, investment advisory, discretionary and non-discretionary portfolio management, and cash management services amongst others.

5. That the company is also the promoter of the Genghis Capital Trust Fund, which is an Umbrella Unit Trust Fund established by a Trust

Deed. That Trust Deed was entered into between the company, as the promoter and Kenya Commercial Bank Limited as Trustee, British American Asset Manager and Chase Bank (Kenya)(the Bank) Limited (which is now in Receivership) as custodian of the Fund.

6. In November 2015 King, according to the company invested Kshs. 1,750,000 while Wanjau invested Kshs. 8,500,000 in the Unit Fund; but according to the petitioner's they invested those amounts in the company.

7. The petitioners did, however, through the affidavit of Wanjau, concede that their investment was in the GENCAP Hela Fund.

8. The amount invested by the petitioners is the amount demanded from the company through the statutory demands of 8th and 15th March 2018.

9. It needs to be said that Chase Bank (K) Ltd on or about 7th April 2016 was placed in Receivership by Central Bank of Kenya and Kenya Deposit Insurance Corporation. According to the company the funds invested by the Petitioners were deposited with that Bank. In view of the Bank being placed under Receivership, the company stated that the petitioner's investment was unavailable.

ANALYSIS AND DETERMINATION

10. The jurisprudence of winding-up of companies, now referred to as insolvency, is that orders of Liquidation of a company cannot be issued when the debt is disputed. This is what the Learned author of **Halsbury's Laws of England, 4th Edition** stated viz:

"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 substantial ground".

11. In a persuasive authority, cited in the case:

In re of **SPENCON KENYA LIMITED [200] eKLR** the judge stated thus:

"In RE MANN –VS- GOLDSTEIN (1968) 2 ALL ER 769 at page 773, the Court held:-

".....(iii) Where the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the Court should, therefore ignore) and the company is solvent the Court will restrain the prosecution of the Petition to wind up the company. As Sir Richard Melins V.C said in Cadiz Waterworks Co. –Vs- Barnett, of a winding up application,

It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist – solvency and a disputed debt."

12. The Learned Judge in that case in **Re Spencon Kenya Ltd (Supra)** the judge also made reliance on the case:

"In RE LYMPNE INVESTMENTS LTD (1972) 2 ALL ER 385, the Court held:

"The companies' Court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought."

13. The company's contention is that the funds of the petitioners were in the petitioner's Unit Fund and were placed with the custodian of the Funds as per the Trust Deed.

14. The Petitioners, in their petition, stated that the funds were paid to the company, but subsequently, by the petitioners replying affidavit, the petitioner acceded that the funds were invested in GENCAP Hela Fund.

15. I have looked at the application Form filed on behalf of King, by its directors dated 31st March 2016. This was the Form whereby King sought to invest its funds. In that Form the applicant, King, made certain declaration. Some of those declarations are:

"I apply for investment into Genghis Capital Unit Trust Fund on the terms, conditions and regulatory inFormation set out in the inFormation Memorandum and other incorporation documents..."

I hereby confirm to have received inFormation on the fund's investment objective, involved risk, handling of income accruals, charges and pricing."

16. The Form also provides Terms and Conditions and amongst those terms is one which is relevant to this matter, that is:

“The investor applies to invest in the one of the sub-funds of the collective investment scheme (the Genghis Capital Unit Trust Fund) in accordance with the provisions of the Umbrella Trust Deed...”

17. It is clear that the petitioners invested in sub-funds of collective investment scheme of Genghis Capital Unit Trust Fund, and not the company. It follows that the company cannot be liquidated on the basis of that investment. It is on that ground that the Notice of Motion dated 3rd July 2018 succeeds. There is no nexus between the investment by the petitioners and the company.

18. Accordingly the orders of the Court are:

(a) The petition is hereby struck out;

(b) The costs of the petition and of the Notice of Motion dated 3rd July 2018 are awarded to Genghis Capital Limited.

DATED, SIGNED and DELIVERED at NAIROBI this 5th day of MARCH, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie.....**COURT ASSISTANT**

.....**FOR THE COMPANY**

.....**FOR THE PETITIONER**