



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
INSOLVENCY PETITION NO. 12 OF 2018
IN THE MATTER OF MAYFAIR INSURANCE COMPANY LIMITED
AND
IN THE MATTER OF COMPANIES ACT, 2015 CAP 486
AND
IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015
BLUELINE PROPERTIES LIMITEDPETITIONER
VERSUS
MAYFAIR INSURANCE COMPANY LIMITED.....RESPONDENT

R U L I N G

1. **BLUELINE PROPERTIES LIMITED** (herein after referred to as Blueline) is the petitioner in this insolvency petition. Blueline is a Limited Liability Company incorporated in Kenya under the Companies Act Cap 486. Blueline, by this petition, seeks the Liquidation, by the Court, of the Company **MAYFAIR INSURANCE COMPANY LIMITED** (herein after referred to as Mayfair). Mayfair is an incorporated Company under the Companies Act Cap 486.

2. Blueline entered into a contract of building works dated 2nd December 2013 with **LEXIS INTERNATIONAL LIMITED** (herein after referred to as Lexis). Under that contract of work Lexis was required, as the contractor, to develop thirteen town houses, and a club house which included mechanical and electrical services and other external work. The employer under that contract was Blueline. The construction was property **L.R. No. 7741/42** and **7741/180**. Lexis, under that contract, Clause 16, was required to provide surety before commencing construction. Mayfair issued a performance bond in favour of Blueline for Kshs.35,560,145.

3. Blueline by this petition alleges that Lexis defaulted in carrying out the contract and that following that default Blueline terminated the contract by its letter dated 19th September 2016.

4. Following that termination Blueline demanded payment of the bond amount from Mayfair. Blueline alleges that because Mayfair failed to make payment of the amount in the bond, as demanded, it served 21 days Statutory Notice demanding under Section 384 as read with Section 424 (e) of the Insolvency Act of 2015 payment of the amount in the bond.

5. Blueline further pleaded in this petition that Mayfair having failed to comply with the Statutory demand, it should be deemed as being unable to pay its debt.

6. Mayfair filed a Notice of Motion application dated 4th May 2018 by which it seeks the striking out of this petition. The notice of Motion is supported by two Affidavit and other exhibits.

7. The first supporting Affidavit dated 4th May 2018 is sworn by Joshua Chiira, Mayfair's Managing Director. By that Affidavit Mr. Chiira stated that the petition is incurably defective, bad in law and was filed with the sole intention of pressuring Mayfair into paying a disputed debt.

8. Mr. Chiira referred to annexed audited accounts of Mayfair and stated that Mayfair was in a healthy financial situation and could have paid the amount if the debt was not disputed. He also referred to the A-(KE) rating awarded to Mayfair by South African's Global Credit Rating. This he said was in recognition of Mayfair's strong financial base.

9. Mr. Chiira while admitting that Mayfair had issued the performance bond in favour of Blueline, however stated that detailed investigations had shown that Mayfair was not due to make payment for that bond. In this regard he made reference to Blueline's letter to Mayfair dated 9th May 2017 wherein Blueline stated it would forward breakdown of its claim to Mayfair but that it had not forwarded that breakdown. Mr. Chiira termed the filing of this petition as malicious and blamed Blueline of having informed the press of this petition which led to an article being published, about this petition, on 25th March 2018 in the Sunday Nation Newspaper.

10. Mr. Chiira further deponed:

a. That I verily believe that the rush to file the Petition and the manner in which the article was published was intended to coerce the Company into paying a debt that was still being assessed.

b. That in the course of assessing liability, the Company has found out:-

i. That the entire Contract between the Petitioner and Lexis International Limited (the Contractor) was for Kshs.355,601,444 (Exhibit JC 10).

ii. That the Company has paid the Contractor a total of Kshs.361,046,509 being an amount of Kshs.5,445,065/86 above the contractual cost.

iii. That in building contracts, a Contractor will submit a Request for Payment Certificate to a Quantity Surveyor appointed by the developer. The Quantity Surveyor will upon verifying the work done and material used authorize payment within 7 days. All certificates presented by the Contractor were honoured save for a final invoice of Kshs.6 Million that was submitted on completion.

iv. That in addition to the foregoing, the Petitioner has in the course of the contract, retained Kshs.18 Million being 5% of the contract price.

v. That the Contractor handed over the site to the Petitioner in October 2016 and despite requests for payment of the outstanding amounts of Kshs.5 Million (sic) and Kshs.18 Million, the Petitioner as failed to pay.

vi. That the dispute between the Petitioner and the Contractor has, at the Contractor's request been referred to Arbitration. (Exhibit JC 11).

vii. That it begs belief that the Petitioner can claim monies as due from the Company when it is the Petitioner who is indebted to the Contractor.

11. Due to the above Mr. Chiira stated that Mayfair deemed the claim herein as fraudulent and therefore repudiated the performance bond by its letter dated to Blueline dated 20th April 2018. In that letter Mayfair stated thus:

“We regret to inform you that after due consideration and investigations, we are unable to accept the claim for the following reasons:-

1. The claim is based on a fraudulent misrepresentation of the facts, fraudulent and deliberately exaggerated;

2. You are stopped, by conduct, from denying that the contractor completed the works to your satisfaction;

3. It is your Company that is indebted to the contractor.

TAKE NOTICE that we have, in the circumstances, disclaimed liability and repudiated the policy.”

12. The second supporting Affidavit is sworn by Michael Mwangi Maina (Michael) who is an employee of Lexis as Project Head.

13. In that Affidavit Michael stated that Lexis deals with construction. That it has been contracted to construct several properties which include Migaa Golf Course where Stephen Gichohi was Director. That the said Mr. Gichohi is also a Director of Blueline. It was in that background Mr. Gichohi requested Lexis to be the main contractor in the construction of town houses the subject of this matter. That because of the steep slope of the land where the construction was to take place and because Mr. Gichohi wanted an additional house to be built for him the architecture altered the plans. This altered plans escalated the costs by Kshs.80 Million. As a consequence the completion period was also extended to 30th October 2015. That during construction and after routine inspection the architect raised some snag list which Lexis rectified Michael however said that a final snag list was not prepared, for the attention of Lexis, when the handing over took place.

14. Before handing over Blueline requested for Variation of scope of work whose total cost was Kshs.11 Million out of which Blueline only paid Lexis Kshs. 5 Million leaving a balance of Kshs. 6 Million.

15. That handing over took place on 30th October 2015 and before the expiry of defect liability period Blueline requested Lexis to hand over houses to their respective owners. Michael deponed that handing over to home owners would not have taken place unless Blueline was satisfied with the construction work.

16. Further Michael deponed that Blueline had retained Kshs.18 Million, according to the contract, which deposit Lexis had demanded together with Kshs. 6 Million, from Blueline, which had not been paid.

17. Further it was deponed that on 28th June 2016, several months after handing over, even to house owners, the architect wrote to Lexis followed by Blueline letter dated 19th September 2016 terminating the contract.

18. That Lexis due to its non receipt of its payment from Blueline referred that dispute to Arbitration which Arbitration is still ongoing.

19. Michael also deponed:

“I am aware of the (sic) my own knowledge the petitioner’s principal Mr. Samuel Gichohi has severally informed the contractor’s (Lexis) managing Director, MR. Dinesh, the project was not profitable and requested the contractor to forgo the costs and make money on other projects.”

20. By her Affidavit Blueline’s Executive Director, Wachuka Gichohi, confirmed that Blueline had terminated the contract on 19th September 2016 because of what she termed as default on the part of the contractor, Lexis. Further the said Executive Director deponed that Blueline’s demand for payment of the bond had *“nothing to do with any dispute there may be between”* Blueline and Lexis. That the performance bond was not conditional and therefore the outcome of the Arbitration proceedings would have no bearing on that payment.

21. It was further deponed that Lexis demand for break-down of the claim was misconceived because Blueline’s claim was not an insurance claim but a claim for payment under performance bond, and therefore, that the repudiation by Lexis was misplaced.

ANALYSIS AND DETERMINATION

22. Both Blueline and Lexis filed their written submissions and legal authorities which I have had the benefit to consider. Blueline, by this petition, seeks liquidation of Mayfair, by the Court, on the ground that Mayfair is unable to pay its debt.

23. As it will be recalled, from the above, all the parties in this matter confirm Mayfair issued, in favour of Blueline, a performance bond in respect to construction of the town houses by Lexis, on Property **L.R. NO. 7741/42 & 7741/180**. The performance bond in part provided:

“Now the condition of the above-written bond is such that if the said Contractor his executors administrators successors or assigns shall dully perform his obligations under the contract, or if on default by the contractor the surety shall satisfy and discharge the damages sustained by the Employer thereby upto the amount of the above written bond, then this bond shall be void, otherwise it shall remain in full force and effect. Upon default, and without prejudice to his other rights under the contract, the Employer shall be entitled to demand forfeiture of the bond and we undertake to honour the demand in the amount stated above.

PROVIDED always and it is hereby agreed and declared that no alteration in the terms of the said contract or in the extent or nature of the works to be carried out and no extension of time by the Architect under the contract shall in anyway release the surety from any liability under the above written bond.

IN WITNESS WHEREOF we have hereunto set our hand this 08th day of NOVEMBER TWO THOUSAND AND THIRTEEN.

24. Blueline does not dispute that the issue of its termination of the contract and the claim by Lexis for Kshs. 18 Million and Kshs. 6 Million is presently before an Arbitrator for determination. Although Blueline stated, through Affidavit evidence, that the issue of its liability to Lexis or its termination of contract have no bearing to the claim for payment of the performance bond: I say it has everything to do with it. Why then is Blueline making a claim for payment on the performance bond - is it not because it alleges that Lexis committed default under the contract and hence why it terminated the contract and why it wishes to have payment on the performance bond made by Mayfair. Those two issues are absolutely intertwined. They cannot be separated.

25. And because those issues are intertwined the inevitable question that needs to be considered is whether the provisions of Section 384 and Section 424 of the Insolvency Act have been satisfied by Blueline. Has Blueline proved that Mayfair owed it a debt which it is unable to pay. Put in other way – can Blueline show that the debt, the subject of this petition, is undisputed. Because if it is disputed it is not a debt that can be the basis of Liquidating a Company.

26. That jurisprudence has been echoed time and time again in the Courts. In the case **RE STANDARD LTD EX Parte TRICOM PAPER INTERNATIONAL B.V [2002] KLR** the Court stated:

“Where it is established that there is no debt, it follows that there is no creditor, that the person claiming to be such has no locus standi and that the petition is bound to fail and once that becomes clear, pursuit of the petition would be an abuse of the process of the Court...”

27. In MATIC GENERAL CONTRACTORS LIMITED VERSUS THE KENYA POWER AND LIGHTING COMPANY LIMITED (2001) LLR 4837 (CAK) the Court stated that:

“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 bonafide 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 bonafide 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 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 Act to be made the vehicle of oppression.”

28. Also in the case IN ReM. WEISS Ltd [1992] eKLR the Court expressed itself thus:

“The third ground on which the petition is challenged is that the debt is not bonafide, so as to entitle the Plaintiff to petition for a winding up. This is a valid pint, it being settled law that it is an abuse of this Court’s process to use the machinery of winding up for recovery of a debt. Proceeding on the above basis, it is observed that in this case, the debt is denied on the basis no request for the services was ever made by the Company. The Company asked for details of the manner in which the order was made but the petitioner instead of providing same, proceeded to file a winding up petition. In my view this is a misuse of the winding up procedure as the debt was validly challenged by the Company. I find that this petition is a misuse of this Court’s process and hereby strike it out with costs.”

29. The above cases clearly show that insolvency is not the forum under which a party can seek to recover to disputed debt. In this regard I wish to respond to the Petitioner’s submission that the Court would not be guided by Regulation 17 (6) (b) of Insolvency Regulation 2016. That regulation 17 only applies to personal bankruptcy matters. It does not apply to liquidation of a Company as this present matter. I therefore do not have to consider if the debt is disputed on grounds that are substantial. That does not apply to this matter.

30. In order to determine if the alleged debt is disputed I need to consider the performance bond itself and what effect of the pending Arbitration has on this claim.

31. I reproduced above part and the relevant part of the performance bond. In part and just to repeat it provide:

“...if on default by the contractor the surety shall satisfy and discharge the damages sustained by the employer.”

32. The above limits the amount payable by Mayfair to the “damage sustained” by Blueline. That provision may very well explain why Blueline in the initial demand to Mayfair, dated 9th May 2017 stated:

“A detailed breakdown of the amount will be forward [ed] to you on finalization of the final account for the project.”

33. Mayfair, by its Affidavit evidence, stated that Blueline has not to-date provided the said breakdown and instead that Blueline proceeded to file this present petition for liquidation.

34. If indeed, as it is stated above, the performance bond required Blueline to provide damages, if any, it suffered as a result of the alleged default of Lexis then the debt claimed herein of Kshs.35,560,145 has no basis. It is not supported by evidence of the alleged damages. It is therefore not a debt that can be the basis of liquidation. Not at all.

35. Further the alleged default is an issue before the Arbitrator. The fact that the Arbitration proceedings were ongoing was known to Blueline, since they are the respondents in those proceedings.

36. It is pertinent to note that Blueline raised a preliminary objection, on jurisdiction, before the Arbitrator and in submitting in support of that objection Blueline argued that what was before the Arbitral Tribunal was the termination of the contract. Blueline therefore clearly appreciated that termination is before the Arbitrator and that termination is at the heart of the claim against Mayfair.

37. In my view Blueline’s filing of this petition, in the light that the termination of the contract was being considered in Arbitration: and knowing that under the performance bond Mayfair was supposed to satisfy or discharge the damages it Blueline suffered because of the alleged default of Lexis – that was an abuse of the Court process which this Court cannot countenance.

38. Before concluding my discussion I need to address the submission of Mayfair that the statutory notice served upon it by Blueline’s Advocate was null and void. Mayfair relied on Section 384 (1) (a) of the Insolvency Act and submitted that the Statutory Notice should have been issued by Blueline. That Section provides:

“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.”

39. That Section requires the Statutory Notice to be issued by a creditor. A creditor is defined under section 2 of that Act as:

“includes a person entitled to enforce a final judgment or final order.”

40. That definition does not include an agent, such as an advocate. A creditor on the facts before Court would be Blueline, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in Section 384 (1) (a) of Insolvency Act. Blueline was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice Blueline is unable to prove that Mayfair is unable to pay its debts.

41. It will be recalled that Michael in his Affidavit deponed that one of the principals of Blueline had asked Lexis Managing Director to forego the amount Lexis is claiming from Blueline. That damning deposition was not responded to by Blueline and it follows that Blueline does not dispute the same. Since it is not disputed, and in the light of the above discussion, Blueline had no basis of seeking liquidation of Mayfair.

42. The action of filing this petition, which was highlighted by the press is indeed unfortunate and the damage it has done to Mayfair may never be known.

43. It is clear that the present petition must be struck out. The petitioner will bear the costs of the Company.

44. In the end and for the reasons set out above this petition is hereby struck with costs to the Company, that is Mayfair Insurance Company Limited. Mayfair Insurance Company Limited is also awarded costs of the Notice of Motion dated 4th May 2018.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH day of MAY, 2019.

MARY KASANGO

JUDGE

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

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

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

..... **FOR THE RESPONDENT**