



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
INSOLVENCY PETITION NO. E016 OF 2019
IN THE MATTER OF KENYA AIRFREIGHT HANDLING LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT, ACT NO. 18 OF 2015

RULING

PRELIMINARY OBJECTION

BACKGROUND

Kenya Airways PLC filed Petition on 18th June 2019 seeking liquidation of Kenya Air Freight Handling Limited (**KAHL**) a subsidiary of the Petitioner and Stamina Group B.V. The Petitioner, majority shareholder of the subject Company **KAHL** and Stamina Group B.V have experienced deadlocks in voting resolutions; the most recent arising from rejection of financial statements 2015/2016 & 2016/2017.

By a certificate of urgency application dated 18th July 2019, under **Section 3 (1), 427(3) and (4), 428(1)(a) and (2), 447(1) 692 of the Insolvency Act, Regulation 10(4), 77B(2)(b) of the Insolvency Regulations, Sections 1A and 1B of the Civil procedure Act, Article 159(2)(c) of the Kenyan Constitution** and the inherent powers of the Court; the Applicant sought orders;

- a) That an order be issued by way of an injunction pending the hearing and determination of this application or further orders of this court restraining the Petitioner whether by itself, its agent, assigns, employees or any other person acting on its behalf from advertising the petition (whether in the Kenya Gazette or any of the local dailies);
- b) The petition dated 17th June 2019 be struck out with costs to the Applicant, Stamina Group B.V.

The Applicant relied on the following grounds;

- a) That the Petitioner, a shareholder of the Company, has presented this petition seeking to liquidate the Company on just and equitable grounds;
- b) That the only other shareholder of the Company, Stamina Group B. V. vehemently opposes the liquidation of the Company as;
 - (i) it has been presented prematurely as the Petitioner has not exhausted the deadlock resolution mechanisms laid out in the Shareholders Agreement between the parties,
 - (ii) some of the deadlock items have been fully resolved,
 - (iii) the Petition is made in bad faith and with *ulterior motives* and in particular and attempt to push out StaminaGroup B. V. from the business and the petitioner partners with a different entity,
 - (iv) the Company is solvent and still operational and
 - (v) the Petitioner, Kenya Airways, has no *locus standi* to present this petition under **section 425 (1)(a) of the Insolvency Act** as it has purported to do as it neither “the Company nor “a director of the Company” and therefore the petition is a *nullity ab initio* and ought to be struck out.

c) That in the event the petition is published, it will cause extreme damage and prejudice to the Company as a wrongful impression will be created to its employees, business partners, bankers, creditors, the Kenya Revenue Authority etc that the company is insolvent. This harm cannot be quantified and would be irreversible.

d) That the petitioner is acting unreasonably in pursuing liquidation of the company instead of pursuing other remedies as set out in the Shareholders Agreement.

e) That it is in the interests of justice that the issue of outstanding rent be addressed at the earliest opportunity and the hearing of the present application will address the issue to the benefit of both parties.

SUPPORTING AFFIDAVIT

The applicant supported its application and stated as follows in respect to the deadlock issue;

a) That it was true Stamina and Kenya Airways had reached deadlock on three (3) major issues, namely;

i) Stamina directors failing to approve and sign financial statements for the years 2015/2016, 2016/2017 and 2017/2018,

ii) Costs charged to Stamina for palletizing material – the allegation being that total Touch Cargo BV, a third party, had refused to (1) settle invoices raised by the Company (for the period since April 2012) with respect to palletizing material

iii) Staff rationalization process- The request was to have outsourced staff (through a third party Total Touch Limited) terminated by **TTC Limited** to allow **KAHL** engage its own staff at ostensibly cheaper rate in order to save on operational costs.

b) However, it was not true that the three deadlock issues are all still outstanding. Indeed, at a board meeting, the directors of Stamina proposed to approve the financial statements (notwithstanding Stamina's legal right and justification not to sign the financial accounts as presented). This proposal was however rejected by the Kenya Airways directors. In any event, Stamina is ready and willing to sign off on any outstanding financial statements, therefore it is no longer a deadlock issue.

PRELIMINARY OBJECTION

Against the application filed by the co shareholder Company Stamina Group BV of 18th July 2019;

The Petitioner/Respondent raised a preliminary objection on 30th July 2019 arguing that;

1. The alleged Applicant, Equatorial Commercial Bank Limited is unknown to the Petitioner/Respondent;

2. The alleged Applicant, Equatorial Commercial Bank Limited, is not creditor of the Company;

3. The application refers variously to Stamina Group BV but is clearly made on behalf of a different entity;

4. The admission at **paragraph 10(a)(i) of the affidavit of Karel Bruno Swings** in support of the purported application discloses conduct which is criminalized by dint of **part XXV of the Companies Act, 2015 and in particular Section 635 and 652** thereof and disentitles the applicant from maintaining this application.

ORAL SUBMISSIONS

Counsel for the Petitioner submitted that the application filed by the Respondent to the Petition was on behalf of Equatorial Commercial Bank as an opposing Creditor who sought orders and yet the bank is not a party and is not known in these proceedings. The Petition is a shareholder's and not Creditor's petition. The application as framed is defective and incompetent and ought to be dismissed.

With regard to the admission at **paragraph 10(a)(i) of the affidavit of Karel Bruno Swings the Applicant** admitted non compliance of the statutory requirement to sign financial statements. Therefore, a party that freely admits to have acted contrary to statute should not have audience in Court and should not benefit from the orders from the Court. The Petitioner cited the following provisions that the Respondent failed to comply with;

a) Section 143 of Companies Act-Duty of Director to promote the success of the Company

b) Section 632 Companies Act-how the Company's financial year is determined by Directors and Financial Statements prepared. Section 632(5) Companies Act provides penalties to any/all directors in default.

c) Section 652 (2) Companies Act- Directors to approve and sign financial statements- Directors shall sign their names on Companies balance sheet.

Section 652(4) Companies Act –penalties are provided for non-compliance.

d) Section 653 (3) Companies Act – Directors have a duty to prepare Director’s report.

The Petitioner/Applicant stated the Respondent failed to comply with the above mandatory provisions of the **Companies Act** and should not be granted injunction, given audience to argue its application.

Counsel for the Respondent objected to the Preliminary Objection on the following grounds;

The insertion of Equatorial Commercial Bank is an error from the Applicant’s office and it is conceded that it is not a party to the instant proceedings.

The appropriate party is Stamina BV as shown at the outset in the application of 19th July 2019 which was duly served.

On the face of the petition the parties are outlined.

The Equatorial Commercial Bank is mentioned only once and is an error.

The letter of Authority to represent and file matter in Court marked K5-1 is by Stamina BV

The **CR 12** from Companies Registry on the shareholders/directors of the subject Company KAHL are Kenya Airways & Stamina BV

There is the Supporting Affidavit Karel Bruno Swings the Applicant that shows who the party to the matter is.

The name Equatorial Commercial Bank entry in pleading was/is error and maybe cured by virtue of **Article 159(d) COK 2010 & Order 51 Rule10(2) CPR 2010**.

The Applicant admitted noncompliance with statutory requirement to sign financial statements but there are grounds for failing to sign them. The Applicant, Stamina BV has not been convicted in a Court of law and thus the section on penalties and continuing penalties accrue thereafter. The Applicant objected to the Petitioner asking the Court to shut out 1 of 2 shareholders of the Company from liquidation proceedings. If not allowed to participate in liquidation of the Company proceedings it will infringe on their constitutional right under **Article 48 COK 2010** on access to justice. There will be no prejudice to the Petitioner who is seeking drastic reliefs of liquidating the Company if the only other shareholder is given audience in court. The Respondent sought that the Preliminary Objection is dismissed.

DETERMINATION

The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors (1969) EA 696**. At page 700, Law, JA stated that:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

This Court has considered issues 1, 2, 3 of the Preliminary Objection that Equatorial Commercial Bank Limited was/is included as a party and the Applicant of the Notice of Motion filed on 19th July 2019. It is conceded as an error in preparation of the documents/application from the Applicant’s office. To that extent the Preliminary Objection is upheld. However, by virtue of **Article 159 (d) COK 2010** which prescribes that; **“justice shall be administered without undue regard to procedural technicalities”**; **Order 51 Rule 10 CPR 2010 that provides; “No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”** commends the application of 19th July 2019 to be heard and determined on its merits. The error although acknowledged shall not affect the substance of the application.

With regard to the 4th issue of the Preliminary Objection that the Applicant of the application be shut out and the application of 19th July 2019 be dismissed as the Applicant admits non compliance of statutory obligation to sign financial statements is not an issue to be conclusively determined at the Preliminary stage. By the **Mukisa Biscuit Case**, it is not a clear question of law that determines the hearing and determination of the suit. This because although it is not contested the existence and requirement for Directors of a Company to sign financial statements, the applicant admitting the same ; raises 2 issues, the first reasons why the Applicant refused to sign and secondly, that the applicant is ready and willing to comply with the mandatory requirement. In short, the 3rd issue is the main issue with regard to the liquidation petition by the Petitioner and the Respondent’s Application for stay of liquidation proceedings. It is not a pure question of law that determines the matter at this stage; instead it calls for parties to ventilate and canvass the matters *inter partes*. Consequently, before final orders are granted either in the Petition and/or the application for stay of liquidation proceedings parties are entitled to fair hearing envisaged in **Article 50 of COK2010**.

Finally, the Court has observed that the matter revolves around feuding shareholders of KAHL Company; whereas each party is entitled to vindicate its rights, the greater responsibility is to ensure justice and more importantly, it is to protect legal interests of the Company itself as a going concern. The primary role is to ensure the Company maintains and continues management and operations while resolution of shareholders’ deadlock or stalemate is resolved.

DISPOSITION

1. For the above reasons; the Preliminary Objection is partly upheld with regard to the Applicant's inclusion of a non party to the proceedings Equatorial Commercial Bank and is conceded as an error.
2. The rest of the Preliminary Objection is not a pure point of law to determine the whole suit at this stage but the main issue for hearing and determination by parties under Article 50 of COK 2010.
3. The parties/Counsel to set down the appropriate matter for hearing and dates obtained from the Registry.
4. Each party to bear own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 12TH NOVEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MS KOSGEY HOLDING BRIEF MR. LEILA FOR THE PETITIONER

MR. NYARIBO FOR THE RESPONDENT

MS JASMINE – COURT ASSISTANT