



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E 029 OF 2018

KENINDIA ASSURANCE COMPANY LIMITED.....PLAINTIFF

- VERSUS -

THE ADMINISTRATOR NAKUMATT HOLDINGS LTD.....1ST DEFENDANT

NAKUMATT HOLDINGS LTD2ND DEFENDANT

RULING

1. The plaintiff, Kenindia Assurance Co. Ltd, is a limited liability company carrying on business of insurer in Kenya.
2. The 1st defendant is the court appointed administrator of Nakumatt Holding Ltd. Nakumatt Holding Limited, the 2nd defendant is a company incorporated in Kenya and which is in administration pursuant to an order of the court of 22nd January 2018 in High Court Insolvency Cause No 10 of 2017.
3. This action was provoked by the 1st defendant's statutory demand under section 384 of the insolvency act dated 14th May 2018 addressed to the plaintiff, which demanded payment from the plaintiff of Ksh 181,344,573. Within 21 days. That demand stated that if payment was not made as demanded, a petition for winding up of the plaintiff company would be filed.
4. The plaintiff by its plaint seeks prayers that:
 - a. An injunction be issued to prevent the 1st defendant from commencing liquidation proceedings against the plaintiff.*
 - b. A declaration that the plaintiff is not indebted to the defendnat in the sum of Ksh 181,344,573/-*
 - c. A declaration that the plaintiff is entitled to set off any money payable under insurance claims against any debts owed to the plaintiff by the 2nd defendant.*
5. The plaintiff pleaded in its plaint that prior to filing the suit it had three business relationships or transactions with the 2nd defendant as follows:
 - “i. The second defendant had insured several risks with the plaintiff for which the plaintiff had issued insurance policies. There were premiums due to the plaintiff from the second defendant and there were also some claims which the second defendant had made under the policies which were under consideration.*
 - ii. The second defendant was the tenant of premises in the plaintiff's property in Eldoret namely Eldoret Municipality Block 7/95. The amounts due under the lease were in arrears.*
 - iii. The second defendant had borrowed moneys from the plaintiff for which the second defendant had issued commercial paper.”*
6. The plaintiff alleges that the 2nd defendant owes it the following sum:
 - a. Commercial paper of Ksh 117,360,787 with interest from 1st May 2018*
 - b. Insurance premium of ksh 87,316,008.*

c. Rent for Eldoret premises for ksh 22,899,716.59

7. The plaintiff by this claim not only denied the 2nd defendant's claim but has sought to set off that amount against the amount the plaintiff alleges the 2nd defendant owes it.

8. The plaintiff pleaded that it is solvent and to demonstrate this it provided its audited financial statement to show that as at **31st December 2016**, it had assets of Ksh 3,127,559,000/- and as at **31st December 2017**, it had net assets of **Ksh 3,694,286,000/-**.

9. I have considered the parties affidavits and the plaintiff's written submissions. Having done so, it is clear to me that both the plaintiff and the 2nd defendant might have legitimate claim of indebtedness from each other. The question that arises then, which can only be determined at trial, is whether they have proof of those debts and if so whether either of them is entitled to set off such indebtedness.

10. Having made that finding, it becomes clear that the threatened winding up of the plaintiff could not proceed until the determination of that issue is made. This is because, those debts are disputed. The plaintiff's reliance on the case **Matic General Contractors Ltd vs Kenya Power and Lighting Co. Ltd (2001) 2 EA** is relevant because the Court of Appeal held that a debt in dispute cannot form the basis of a winding up petition.

11. Similarly, it was the holding of the court in the case of **Mugoya Construction & Engineering Company Limited [2015] eKLR**. In that case the High Court in considering a petition for winding-up of a company referred to the following cases which are relevant here:

"The case of Mann Vs Goldstein [1968] 2 ALL ER 769 ungoed-Thomas J stated at page 775:

"for my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. This seems to me to be in accordance with the statement of Kekewich J [1894], 70 LT at p 272), which I have quoted, even though it be borne in mind that the company in that case was solvent: and the references to irreparable damage in the other cases which I have mentioned, where the petitioners were contributories or creditors petitioning against solvent companies, do not exclude an injunction being granted to prevent an abuse of the process of the court. Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition.

.....in the case of Cruisair Limited vs CMC Aviation Limited (No.2) (1976-80)KLR 874 which quoted the following statement from Buckley on the Companies Acts (11th Ed) pages 356,357 that:

"A winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court."

12. With that in mind the notice of motion dated **4th June 2018** is merited. The plaintiff is entitled to an order of injunction to prevent the commencement of liquidation proceedings. The plaintiff will also be granted approval to commence this case against the 2nd defendant as provided under section 560 (1) (d) of the insolvency Act 2015.

13. The final orders of the court are:

a. An interlocutory injunction is hereby issued to prevent the 1st defendant from commencing liquidation proceedings against the plaintiff or advertising any liquidation proceedings pending the hearing and the determination of this suit.

b. An approval is hereby granted to the plaintiff to commence this proceedings against the 2nd defendant under section 560 (1) (d) of the Insolvency Act 2015. To that end, this proceedings are deemed to have commenced with that approval.

c. The costs of the notice of motion dated 4th June 2018 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE