



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 2 OF 2016

IN THE MATTER OF: PRIDEINN HOTELS & INVESTMENTS LTD

VERSUS

**IN THE MATTER OF: THE COMPANIES ACT, CAP 486 (REPEALED) AS READ WITH
SECTION 734 (1) (g), INSOLVENCY ACT, 2015**

R U L I N G

1. For determination by the court are two matters:-

a. Notice of Preliminary Objection dated 4/5/2017 and contending that:-

i. The petition dated 27/10/2016 is in contravention of PART 6 of the Insolvency Act, 2015.

ii. The Petition contravenes section 1023(4) of the Companies Act 2015.

b. Notice of Motion dated 4/5/2017 seeking orders that:-

i THAT the petitioner has purportedly presented a winding up Petition before Court under the insolvency Act,2015 whereon the petitioner is attempting to force the petition to be under the repealed Companies Act (CAP 486) Laws of Kenya knowingly well that the winding rules thereon were revoked.

ii. THAT in furtherance of the cause of the petition, the petitioner has without leave of the court caused to be published in the Kenya Daily Nation Newspaper and the Kenya Gazette, an advertisement informing the public of the petition filed and informing other creditors who wish to join the cause to do so.

iii. THAT as a result of the said publication, concern and anxiety has been created amongst diverse stakeholders in the business of the Petitioner including banks and creditors especially since the petitioner caused to be published in the Kenya gazette on the 21st of April 2017 and then revoked it and published it again on the 28th of April 2017.

iv. THAT the Public relations of the business of the petitioner, which involves hotel and hospitality whose nature requires a good public image and reputation, has been greatly damaged by the advertisement and there is a panic within the general public, the bankers and the respondent clientele.

v. **THAT since the petitioner advertised the petition herein in the daily nation newspaper the respondent has lost contracts of service amounting to millions of Kenya shillings of losses in particular they lost a large contract with ICPAK who were to have a conference at the respondent in the end of May 2017 and the respondent had a contract with the United Nations who were to have a contract at the end of June 2017.**

vi. **THAT since the petitioner advertised the petition herein in the daily nation newspaper the respondent's bank including Diamond Trust Bank have called the respondent threatening to recall their large financing facilities issued to the respondents should the respondent fail to clear up the matter by Friday 5th of May 2017.**

vii. **THAT the above demerits caused on the Respondent are as a consequence of the petitioner purporting to rely on rules which are no longer in existence.**

viii. **THAT should this application not be heard urgently then the respondent will be prejudiced and suffer great loss.**

2. By those two, the Company challenges the propriety of the Winding Up Petition and therefore the procedural steps taken by advertisement in the daily Newspapers .Without saying so explicitly in the Preliminary Objection, it is easy to conclude that the Company seeks that the petition be strike out and in the Notice of Motion it seeks that the advertisement carried out in the Daily Nation Newspaper of 3/5/2017 be declared un-procedural invalid and an apology be rendered.

3. When the parties attended court on 11/5/2017 it was agreed that the Preliminary Objection and the application be heard together and a single determination rendered.

4. A look at both, matters show that, if the Preliminary Objection succeeds then there would nothing outstanding to merit considering the application. However should the objection fail then there would be need to consider prayers 6 & 7 of the motion noting that the rest have become spent after address to court by the parties.

5. The notice of motion was supported by the sworn Affidavit of SHABIR MOHAMED KASSIM and a further affidavit by the same deponent while the Petition did file a Replying Affidavit by one SALIM SULTAN MOLOO. Parties equally filed list and copies of authorities and did offer oral submissions before court.

Submissions by the Company

6. Mrs. Ali Advocate grounded her objection to the Petition on the basis that it contravenes Part 6 of the Insolvency Act and Section 1023(4) of the Companies Act. The totality of her submissions is that this petition having been grounded on the Rules made under the repealed Companies Act the same does not lie as the said Rules were equally repealed by dint of Section 1023(4) of the Companies Act, 2015. To Mrs. Ali the claim having been made after the effective date of the Insolvency Act it could only be brought under the new statute and not under the repealed Act.

7. Reliance was then placed up two decided cases being Nairobi Winding Up Cause No. 7 of 2016 in the matter of Winding Up of ***Blue Bird Aviation Ltd [2016] eKLR*** on the interpretation of section 734(1) (2) of the Insolvency Act and Winding Up Case No. 12 of 2013 in the matter of ***Karuturi Limited [2016] eKLR*** which the Advocate contend Ochieng J, agreed with Ogola J in the interpretation of the law applicable. She then urged the court to allow the Preliminary Objection and the Application as prayed.

Submissions by the Petitioner

8. In answer to Mrs. Ali's submissions, Mr. Kinyua Advocate, relied on the Replying Affidavit and the papers filed with the Petition and stressed the fact that there is an admitted debt evidence by an agreement and a deed of variation duly signed and undertaking to pay the debt and that the Reply to Petition,

Paragraph 22 admits the debt as much.

9. He faulted the application for having been filed too late in the day and outside the 14 days set by the Repealed Rules and that the application has the potential to indefinitely forestall the petition.

10. On the decisions cited, Mr. Kinyua submitted that the decision by Ogola J was decided incorrectly and appointed out that it relates and refers to the Provisions of Section 342 Insolvency Act, which has no relevance to the dispute at hand and makes reference to section 402(4) which does not exist in the insolvency Act.

11. In his view and submissions Section 734(2) of the Insolvency Act allows dealing with the current petition under the repealed statute and the Rules made thereunder.

T12. o Mr. Kinyua the position taken that this petition should be dealt with under the Insolvency Act, 2015 and not otherwise will not resolve the dispute between the parties. To him there was justification under section 424 of the Insolvency Act to bring this petition as there is a debt the company has been unable to pay despite demand.

13. The Petitioner then relied on the decision in *Re Karuturi Ltd [2016] eKLR* for the proposition that the provisions of the repealed act continue to apply as a salve for any defect and deficiency in the petition.

Analysis and determination Preliminary Objection

14. For a point to be considered a preliminary objection or a demurrer, it must have the potential to fully and finally bring the matter to a termination and it must be argued on the basis that the matters of fact alleged by one side are not in contest or rather admitted by the opposite side. See *Sir Charles Newbold in Muksha Biscuits Ltd vs Westend Distributors Ltd [1969] E.A, 100*.

15. The objection before me is not that there is no admitted debt to invite an Winding Up Cause, rather it is an objection that the Petition does not lie because it is premised on the provisions of the repealed statute the Companies Act, Cap 486 and not the Insolvency Act, 2015.

16. To put the matter in its perspective it is important to reproduce the two provisions of the Act which I find pertinent. Those are sections 734(2) and 3. I consider the provisions to be pertinent because both sides take each and relies on it to the exclusion of the other.

It provides:- **Section 734(2) & (3) Insolvency Act**

Despite the repeal of the Companies Act, or of Parts VI to IX of that Act, those Parts, and any other provisions of that Act necessary for their operation, continue to apply, to the exclusion of this Act, to any past event and to any step or proceeding preceding, following, or relating to that past event, even if it is a step or proceeding that is taken after the commencement.

Subsection (2) has effect subject to any transitional regulations in force under section 736 that relate to the insolvency of companies and other bodies corporate.

17. I have underlined the words of the provision which I find pertinent to the question at hand. With the provisions in mind it is now necessary to put the points of objection in perspective and to find out whether the petition is bad on the two reasons advance.

What are the obligations of a petitioner under Part VI of the Insolvency Act

18. Part VI of the Insolvency Act provide for liquidation of companies. It distinguishes between voluntary liquidation and liquidation by the court. There is also a distinction between members 'and creditors' voluntary liquidation and gives a definition of inability to pay debts.

19. The matter before me is clearly not a voluntary liquidation and must be seen to have been brought pursuant to Section 427(i)e and 425(1) b. Those provisions merely permit and provide for liquidation of a company by the court but do not provide for the procedure. Parliament then vested upon the Rules committee, with the addition of the, official Receiver, Under Section 697, to make insolvency Procedure Rules. I have consulted and established that the Rules committee is yet to promulgate the Rules under the Act.

20. The question one needs to address is whether the statute shall remain impotent merely because the Rules have not been promulgated. In my view, the rules do not operationalize the Act but rather facilitates its efficiency. The Act was operationalized the moment its various provisions were commenced on various dates.

21. This to me explains the need for the existence of section 734(2) so that no lacuna is created. I would add that even without the saving provisions a court reserves inherent jurisdiction to meet its core mandate of dispute resolution and that even if there was to be no saving provisions and even without the need to cite which provision of the law a petition to liquidate a Company is brought, the court has the right to receive and consider a petition and is duty bound to hear the parties on the dispute and deliver itself upon the facts when applied to the law. This must be the true meaning of Article 159(2) d of the Constitution. This is equally what the drafter of the statute must have intended to achieve when they devoted the whole of section 3 of the Insolvency Act to the objects of the Act.

22. In answering the question I have posed hereinabove, I find that all a petitioner for liquidation needs to do is to prove that there is an admitted debt for which demand to pay has been made and the company has not complied with the demand. Once he discharges that obligation the duty then shifts to the court in its determinative mandate to find for or against the petitioner based on the evidence adduced as applied to the law. That is what is pending and to which the parties agreed be done on the 12/6/2017.

23. Before evidence is led, and each party given his fair chance to put its case forward, it would be jumping the gun to purport to make a determinative decision in this matter. My finding is that there is nothing in part six (PART VI) of the Insolvency Act that make this petition bad. For that reason the first limbs of the preliminary objection fails and it is hereby dismissed with costs.

24. I may only add that by disallowing the objection I am preserving for the parties the right to have their day in court. I hold the view that a court of law should be hesitant to shut its doors to any litigant by denying it the opportunity to ventilate its grievances. Additionally, it must be appreciated that any time a court strikes out a matter before having it on the merits, it does no good to anybody. Infact, its does prejudice to itself by inviting a second litigation at additional costs to the parties and thereby disproportionately employing judicial resources and exposes the parties to uncalled for expenses and costs.

Has Section 1023(4), Companies Act 2015, been affronted?

25. The statute Companies Act, 2015 provides:-

i. The provisions of the Companies Act are repealed on such date or such different dates as the Cabinet Secretary may appoint by notice published in the Gazette.

ii. When bringing provisions of this Act into operation by a notice made under section 1(3) of this Act, the Cabinet Secretary shall ensure that all provisions of the Companies Act (Cap 486, Subleg) that correspond to those provisions are repealed contemporaneously by a notice published under subsection (1) of this section.

iii. However, if the provisions of this Act that are to be brought into operation correspond to provisions of the Companies Act that are to be repealed by notice under subsection (1), the Cabinet Secretary may instead combine the repeal of those provisions of the Companies Act in the notice under section 1(3) of this Act bringing the relevant provisions of this Act into operation.

iv. On the repeal of section 342 of the Companies Act, the following rules are revoked:-

a. The Companies (winding up Rules

b. The Companies (Winding-up Fees) Rules

c. The Companies (High Court) Rules

26. The argument on this objection flows and follows the ascertain that the Companies Act, in particular Section 342, was repealed and with it were repealed the Rules made there under including the Companies (Winding Up) Rules.

27. I appreciate that the former Companies Act provided for both general company matters as well as Insolvency. Now we have a specific Act governing insolvency and one need not seek any assistance from the Provisions of the Companies Act to determine a matter of insolvency. It would be to me, immaterial that there are no Rules but I have said that Section 734 (2) retains Rules for purposes of insolvency. That limb of the objection equally lacks merits and is dismissed.

Application dated 4/5/2017

28. I have said at the beginning of this ruling that the application would only be due for consideration if the objection fail. It has now failed and I will consider the application noting that only prayers 6 & 7 are pending.

29. These prayers fault the advertisement of the petition and demands that the newspaper adverts be retracted and an apology offered. The reason is that the advertisement has put the company into peril of bad publicity and therefore loss of business.

30. I appreciate the need of the advertisement and its wording to be intended for the information of the general public so that anyone with interest in the dispute may join the petition.

31. Now that the advert has been made and consumed by the public, I don't consider it effective or of any benefit to make any order staying the advert or ordering an apology. One cannot stay what has happened. Let the matter proceed as earlier scheduled and progressed expeditiously so that it is brought to a conclusion at the earliest possible opportunity. However for the sake of good faith and integrity of the court process let no further adverts in the mainstream media or social media be resorted by either side.

32. I disallow the application but order that costs be in the course.

Dated and delivered at Mombasa this 09th day of June 2017.

HON. P.J.O. OTIENO

JUDGE