



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
WINDING UP CAUSE NO 4 OF 2013
IN THE MATTER OF RENTFORD DRAPERS LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CAP 486 LAWS OF KENYA)

RULING

INTRODUCTION

1. The Company filed a Notice of Motion application dated 22nd May 2013 and filed on 24th May 2013 that was brought under the provisions of Section (sic) 222 and 223 of the Companies Act Chapter 486 of the Laws of Kenya. Prayer No (1) was spent. It sought the following remaining orders:-
 1. **Spent.**
 2. **THAT this Honourable Court be pleased to order a stay of proceedings pending the hearing and determination of prayer (3) and (4) herein and/or until further orders of the court.**
 3. **THAT this Honourable Court be pleased to allow the Applicant make payment of the admitted sum of USD 38,000 plus agreed costs of USD 380 in six (6) equal monthly instalments with effect from 10th Day of the Month following thereafter on the 10th of every successive month.**
 4. **THAT this Honourable Court be pleased to order the Petitioner to issue to the Applicant a credit note for the sum of Kshs 1,316,311/= which was due to it.**
 5. **THAT this Honourable Court be pleased to give such directions as it may deem necessary.**
 6. **THAT costs of this Application be granted to the Company.**

THE COMPANY'S CASE

2. The application was supported by the Affidavit of Kiran Shah, a Director in the Company that was sworn on 22nd May 2013. The Company's written submissions were dated and filed 20th February 2014.
3. The Company admitted that it retained the Petitioner's services for purposes of clearing the Company's goods and owed it a sum of USD 38,000. It had paid the Petitioner a sum of USD 114,450 out of USD 152,500. However, the Petitioner did not discharge its duties diligently as a result of which the Company suffered losses in profits and clientele.
4. It stated that the Petitioner's Petition to wind it up was accentuated by malice as it had forwarded to the Petitioner proposals on how to liquidate the outstanding sums of money, which the

- Petitioner initially accepted but subsequently rejected. It also pointed out that the Petitioner had also failed to disclose that it had paid it a sum of USD 8000 which the Petitioner did not bank, return or issue it a credit note.
5. It therefore urged the court to grant it the orders that it had sought in its application.

THE PETITIONER'S CASE

6. Francis Gachari, the Petitioner's Credit Controller swore a Replying Affidavit on behalf of the Petitioner. The same was sworn on 10th June 2013 and filed on even date. The Petitioner's written submissions were dated and filed on 11th March 2014.
7. The Petitioner denied that its filing the Winding- Up Petition against the Company herein was accentuated by malice. It pointed out that it had indulged the Company for a long period of time but that the Company had breached all the agreements they entered into. It contended that the Company had in fact admitted being indebted to it and that the Company was not entitled to any credit note.
8. It was emphatic that the Company's present application was premature as it was intended to prejudice its Petition and that in any event, the Company had not demonstrated its ability to pay the outstanding monies as it had proposed. It therefore urged the court to dismiss the said application.

LEGAL ANALYSIS

9. The Company submitted that it was at all material times willing to settle the Petitioner's debt by instalments which the Petitioner had rejected. It said the Petitioner was in effect rejecting the said proposals by opposing the application. The Company herein urged the court to disregard the Petitioner's submissions that the present application was premature and placed reliance on Article 159 (2) (d) of the Constitution of Kenya, 2010 which mandates the court to administer justice without undue regard to technicalities.
10. It also referred the court to the case of **Matic General Contractors Limited vs Kenya Power & Lighting Company Limited [2001] 2 EA at pg 440** where it was held as follows:-

“Where a Petition against a company is presented ostensibly for a winding up order but really for another purpose such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process and will do so, without requiring an action to be commenced by restraining the advertisement of the Petition and staying all proceedings upon it.”

11. On its part, the Petitioner submitted that the court lacked jurisdiction to grant any of the reliefs that had been sought in the application but that it could only grant such prayers after hearing a petition under Section 222 of the Companies Act. It also argued that the Company's reliance on Section 223 of the said Companies Act was misplaced as the court had no jurisdiction to stay the proceedings herein as the Plaintiff had sought.
12. The Petitioner referred the court to the case of **William Evans Otieno vs the Law Society of Kenya & 2 Others (2011) eKLR** in which it was held that Article 159 (2)(d) of the Constitution of Kenya was not a panacea for incompetent pleadings and ought to be struck out.
13. Having considered the pleadings, the affidavit evidence, written submissions and the case law that was relied upon by the parties, the court found itself in complete agreement with the Petitioner's submissions. Section 222 of the Companies Act would not be applicable herein as the court had not heard the Petition herein. The court could only exercise its power under the said Section upon hearing a Petition.
14. Section 222 (1) of the Companies Act provides as follows:-

“On hearing a winding-up petition (emphasis court), the court may dismiss it, adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the grounds only that the assets of the company have been mortgaged to an amount equal to or in excess to or in

excess of those assets or that the company has no assets.”

15. Turning to Section 223 of the Companies Act, as was rightly pointed out by the Petitioner, the same would not be applicable in the circumstances of this suit. The same relates to the staying of proceedings pending in the High Court or Court of Appeal once a winding-up petition is filed. It does not in any way seem to suggest that an applicant can purport to stay proceedings in a winding-up petition at any given time or as had been contended by the Company with a view to making payments in instalments or at all.

16. Section 223 of the Companies Act stipulates as follows:-

“At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, may, or any creditor or contributor, may-

- a. **Where any suit or proceedings against the company is pending in the High Court or Court of Appeal (emphasis court), apply to the court in which the suit or proceedings is pending for a stay of proceedings therein; and**
- b. **Where any suit or proceeding is pending against the company (emphasis court), apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceedings;**

and the court to which such an application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.”

17. As was correctly pointed out in the case of **William Evans Otieno vs the Law Society of Kenya & 2 Others** (Supra), Article 159 (2) (d) of the Constitution of Kenya would not be able to cure a defective and incompetent application as that was not its objective. It was intended to cure procedural technicalities but not substantive technicalities.

18. Neither the provisions of Section 222 nor Section 223 of the Company's Act that were relied upon by the Company would be applicable in the circumstances herein thus rendering the Company's application substantially defective and incompetent. The court would have no jurisdiction or power to grant any of the prayers that were sought by the Company as the Company's application was misconceived and had no legal basis under the law.

DISPOSITION

19. Accordingly, the upshot of this court's ruling was that the Company's Notice of Motion application dated 22nd May 2013 and filed on 25th May 2013 was not merited and the same is hereby dismissed with costs to the Petitioner.

20. It is so ordered.

DATED and DELIVERED at NAIROBI this 12th day of February 2015

J. KAMAU

JUDGE