



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
WINDING UP CAUSE NO. 16 OF 2008

IN THE MATTER OF SWAN MILLERS LIMITED

AND

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

JUDGEMENT

Petitioner's case

[1] The Petitioner, **KETI INVESTMENTS LIMITED**, a limited liability company and also one of the three shareholders of the company filed a petition dated 10th July, 2008. The petition seeks for the following orders:-

- a. ***THAT any purported sale and transfer of the company's property and assets by Hon. Simeon Nyachae as per the sale Agreement dated 16th August 2006 to Luna Limited be declared null and void and of no legal effect and/or be set aside***
- b. ***THAT all assets and property of the company purportedly sold by the Hon. Simeon Nyachae do forthwith be returned to the company***
- c. ***THAT the said Hon. Simeon Nyachae and his alternate Director be restrained from dealing in anyway with the remaining assets of the company namely; L.R No. MN/V/703 Mombasa and Kisumu Municipality/Block7/404 until the finalization of this winding up.***
- d. ***THAT winding up order do issue against the company.***

[2] The Petitioner abandoned prayers (a) and (b) of the petition given the time that has passed by since the petition was filed in 2008 and the fact that a third party, Mombasa Millers Limited have taken over the operation of the mill and the assets of the company. The petitioner will only prove its claim under prayers (c) and (d) of the petition. The petitioner will refer to the petition dated and filed on 10th July 2008 ; affidavit of compliance with winding up rules; affidavit in opposition of the petition by one Simeon Nyachae (**hereinafter referred to as the "1st affidavit"**); supporting affidavit to the chamber summon application (which has since been abandoned) by one Simeon Nyachae (**hereinafter referred to as "2nd affidavit"**); Replying Affidavit to the chamber summons application by one Harkchand Kachra Shah (**herein referred to as "3rd Affidavit"**); and affidavit by one Naren Shah (**hereinafter referred to as the "4th**

affidavit”).

[3] The petition which is verified by an affidavit of one Harakchand Kachra Shah lays down the principal objects for which the company was incorporated and the substratum for the winding up. In paragraph 4 of the petition, it is explicit that the company going by its name Swan Millers Limited was incorporated for the principal purpose of carrying out *milling business*. In this connection, the Petitioner focused on whether the company is still trading in the said business or not. It took the view that, if the answer to the above question is in the affirmative, then their prayers for winding-up should be declined by this honourable court.

Brief facts

[4] The Petitioner gave a brief account of facts leading to this petition are clearly set out in documents mentioned in 2 above. The documents show that the company was dealing in milling business as set out in Article 3 of its Memorandum of Association. The company was in solid and sound position until sometime in the year 2005 when the company started facing grave financial difficulties as evidenced by the letter dated 21st July 2006, addressed to the chairman of the company. See **4th document to annexure SN2 of the 2nd affidavit**. From the minutes of board of directors of 31st October 2005 it was evident that the directors were inclined at selling the company. And as a result, they passed a resolution to sell the company's assets in May 2006. Vide a valuation report dated 3rd December 2005 (**annexure HRS1 of the 3rd affidavit**), the assets of the company on title no. Kisumu Municipal/Block 3/190 was valued at Kshs. 499,880,300/= excluding Trade Marks, vehicles and Machinery hired to Kisumu Plastics Limited. According to the Petitioner, the sale of all these assets should amount to approximately Kshs. 600,000,000/. Directors were given the opportunity to look for buyers of the company assets, but Mr. Simeon Nyachae, unfortunately rejected an earlier offer made to the company and proceeded together with his son One Michael Nyachae; his alternate director in the company, through the firm of Nyachae & company Advocates, a firm run by his other son one Charles Nyachae, to sell the assets and property of the company at a gross undervalue of Kshs. 300,000,000/= to Mombasa Millers limited without the resolution of the board of directors.

[5] The above proceeds of the said sale were received and disbursed by Nyachae & company Advocates to the following entities, again, without the resolution of the board of directors and ascertainment of the company's liabilities:-

i. Prime Bank, Prime Capital and Interest to I&M Bank	Kshs. 156,039,727.00
ii. Interest to Prime Bank Limited	Kshs. 1,168,499.10
iii. Kiruti & Company Advocates (Prime Bank Lawyers)	Kshs. 75,400.00
iv. Swan Millers Limited Loan Account Kisumu	Kshs. 19,231,310.00
v. USD Loan Account Nairobi	kshs. 12,911,599.00
vi. Nyachae & Company Advocates	Kshs. 3,057,098.00
vii. Sansora Limited (Wheat)	Kshs. 10,462,303.05
viii. Simbi Investors Limited (interest paid to I & M Bank)	Kshs. 2,946,577.40
ix. Llyod Investments Limited	Kshs. 91,999,999.62

[6] The Petitioner claims that the firm of Nyachae & company Advocates failed to account for the balance of the proceeds.

[7] From the pleadings, the Petitioner believes these are the issues for determination:-

- a. ***Whether the petition was duly served upon the company;***
- b. ***Whether the directors of the company agreed and resolved to sell its assets;***
- c. ***Whether the firm of Nyachae & Company Advocates were duly appointed by the directors to act for the company in the said transaction and whether they received the proceeds of the sale;***
- d. ***Whether the assets of the company were sold***
- e. ***Whether after the said sale the company continued trading***

- f. *Whether the company is unable to pay its debts;*
 - g. *Whether all the creditors paid by the company through the said firm of advocates were genuine creditors;*
 - h. *Whether the company is entitled to a winding up order;*
- a. **Whether the petition was duly served upon the company;**

[8] Contrary to the claims by the Respondent, the Petitioner averred that the petition was duly served upon one Mr. Surendra Chotabhai Patel who runs a business in Kericho Town known as Kericho Wholesalers Limited on 5th day of August 2008. He is an Executive Director and Shareholder through the firm of Ceebe Investment Limited in the company. An affidavit of service to this effect was filed on 8th August 2008. This is in compliance with **section 391(1)** of the companies Act chapter 486 Laws of Kenya which states:-

A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.

The Petitioner cited the case of *Africa Management Communication International Limited vs. Joseph Mathenge Mugo & another [2013] eKLR* where Justice Mabeya in his judgments stated;

“Given that the 2nd Defendant is a company, the question that arises is how service of an order is to be effected upon a company... To my mind, in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order...”

The Petitioner said that the reason behind service upon an officer of the company in this case is because one Harakchand Kachra Shah who verified the affidavit to the petition is also the Managing director of the company and one who runs the registered office of the company. It was therefore prudent, logical and in order to serve the said petition to one of the Directors of the Company to ensure that the effect of service was not defeated. Therefore, the petitioner submitted that the petition was duly served on the company and shareholders of the company.

- b. **Whether the directors of the company agreed and resolved to sell its assets.**

[9] The Petitioner argued that the evidence adduced show that both parties acknowledge there was a resolution to sell the assets of the company by the directors. The minutes dated 1st July 2008 in respect to the minutes of 21st June 2008 (**annexure SN4 of the 2nd affidavit**), of the extra ordinary meeting of the members of the company, show the explanation by the chairman to the members of the financial difficulties faced by the company which resulted to the sale of its assets. He further elaborated that a meeting was held to discuss the said issue and eventually negotiations were entered into with Mombasa Millers limited for the sale of the same which was within the knowledge of all the shareholders. In addition, by 2005, the issue of selling of the company's assets was already discussed and resolved and directors were already putting forward offers to the public. This is evident from the minutes of board of directors held at swan Millers limited on 31st October 2005 (**annexure SN2 of the 2nd affidavit, Min 3/11/2005**), where matters regarding the sale of the company were discussed. Here, the directors referred to the meeting held on 25th July 2005 where the Board mandated One Mr. M.C Patel to spearhead a negotiation with M/s United Millers Limited for purchase of Swan Millers Limited. However, in his response, he stated that M/s United Millers were not interested in purchasing the mill. Further, by letter dated 12th May 2006, addressed to Tact Corporate Registrars, the company requested for an advertisement for the sale of its mills to be placed in the Daily Nation in Kenya, the East African Standard and widely circulated English newspapers in Uganda and Tanzania with a condition that they should not disclose the identity of the company.

[10] The company assets were as at that moment valued at Kshs. 499,880,300/= excluding Trade Mark, vehicles and machinery hired out to Kisumu plastic Limited and the Directors were given the first opportunity to look for buyers for the said valued assets. See the valuation report **marked HKS1 in the 3rd affidavit**. With the above, it is clear and undisputed that the directors had agreed to the sale of the company's assets but not passed a resolution to affirm that agreement.

c. Whether the assets of the company were sold

[11] After the advertisement of the sale, offers were made via Tact Corporate Registrars, who were appointed to supervise the sale of the said assets, negotiations were entered into, but never concluded as One Honourable Nyachae together with his Son Michael Nyachae; through the firm of Nyachae and Company Advocates, hijacked the process and proceeded to sell off the assets of the company that were valued at Kshs 499,880,300/= as per the valuation report dated 3rd December 2005, together with the assets that were not valued to Mombasa Millers Limited at Kshs. 300,000,000/=. See **annexure SN3 of the 1st affidavit**. The assets of the company were indeed sold as was agreed by the directors, however, issues arose when the Managing Director, herein, Mr Harakchand Shah came to realize that, after endorsing his signature on the transfer documents, the assets which were sold included others which had not been valued namely, the Trade Mark and Vehicles and machinery that were hired out to Kisumu Plastics Limited. According to him, if these assets were to be valued alongside others already valued, the total asset value would be approximately Kshs. 600,000,000/=. It is not, therefore, true as it has been alleged by the Respondent that the petitioner knew that the sale included the Trade Mark, and vehicles and machinery hired to Kisumu Plastics Limited and he signed the transfer documents. In fact it is true that Mr. Harakchand actually executed the transfer but only in the capacity of the Managing Director of the company and with the belief that the assets being sold were in accordance with the valuation report and nothing more and/or less. To prove the lack of knowledge on the part of Mr. Harakchand in regards to what assets exactly were being sold; we refer to an email dated 7th July 2006 from Tact Consultancy in response to the one dated 5th July 2006 by the company informing them of the exact assets put on offer. They expressly excluded Plastic machinery, vehicles and office equipment. It is therefore not true that the Mr. Harakchand knew the sale included trade Marks and vehicles and machinery hired to Kisumu Plastic Limited. He is, therefore, right in his thinking that the sale of the said assets was greatly underpriced yet a better offer could have been secured. All in all, the assets of the company have been disposed of save for two properties namely; L.R No. MN/V/703, Mombasa and Kisumu Municipality/Block7/404.

d. Whether after the said sale the company continued trading;

[12] Before the sale of the said assets, it is an established fact that the company was already running losses and could not afford to sufficiently provide for the cost of production and supply in order to sustain its operations. It is precisely for this reason that it was agreed by the Directors that the assets of the company should be sold. The situation is clearly spelt out in a letter dated 14th July 2004 (**annexure SN2 in the 1st affidavit**) from H.K.Shah and addressed to Hon. Simeon Nyachae, explaining the current financial status of the company at that particular time. Paragraph 8 of the said letter states;

“We will need to discuss various means to raise the capital. It might sound harsh but we will have to also discuss on liquidating some of our properties viz swan center, swan flats, Kisumu plastics, etc...”

They further referred to the letter dated 21st July 2006 (**3rd letter of annexure SN2 of the 1st affidavit**) addressed to the chairman of swan Millers; Hon Simeon Nyachae, and copied to the directors and marked private and confidential, under the title Swan Millers Limited which states;

“All of us are aware of critical financial position of swan millers limited which is

rapidly deteriorating day by day... considering the position of receivables, both short term as well as long term, continuation of milling operations is almost impossible...

The letter goes further to state that under the said circumstances, either the shareholders pump in enough money to keep the milling activity going until the final buyer takes it over or face the adverse impact of losing operations before the transaction is completed. This statement of the Company's status had only one interpretation; that is' the company will cease operations immediately after the sale of its mills. It was crystal clear that the company was under a serious financial crisis and running of its operations became almost impossible. The question is; if with the company's assets, the company was unable to sustain its operations and stood at the verge of suspending their operations and/or ceasing to operate due to financial constraints, how possible would it be to run the same company without its essential assets! The company was a milling company and with its mills sold what other business would it do? Indeed by the letter dated November 3rd 2006 (**annexure SN6 of the 1st affidavit**), Hon S. Nyachae as the Chairman of the company summarized the position as follows:-

“As you are aware, Swan Millers Limited has been sold to Mombasa Maize Millers”

The Petitioner concluded by stating that the company ceased its operations after the said sale and has not been carrying out any business since then. Under **section 219(c)** of the Companies Act;

“...a company can be wound up by court if it does not commence its business within a year from its incorporation or suspends its business for a whole year”.

In the present case, the company has not been operational for more than 3 years now and automatically warrants the issuance of an order for winding up.

e. Whether the company is unable to pay its debts;

[13] Under section **219(e)** of the Companies Act;

“...a company may be wound up by the court if the company is unable to pay its debts”.

The issue of insolvency and inability to pay debts by a company has since been critical in order to acquire a winding up order. Therefore, for a winding up order to issue, there must be proof that the company is insolvent or unable to pay its debts. In the Case of ***Intona Ranch Ltd vs. O'brien [1992] KLR 149***, the Court of Appeal stated at page 159 that:

“It is settled law that the winding up order is not automatic. There must be proof of insolvency and/or inability on the part of the Company to pay its debts.

In addition, the question of when a company is unable to pay its debts has also been dealt with by our courts. In ***Re Azetiland Consultants Limited, Nairobi Winding-Up Cause No. 14 of 2007, [2009] eKLR***, where Kimaru, J. stated as follows:

“Under Section 220(a) of the Companies Act, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do. In my view, all that is required of a Petitioner under this section is to establish that the company is unable to pay a debt that is legitimately due from it. It will not do if the debt is disputed.”

In the present case, the Petitioner submitted that, it is crystal clear from the affidavit in support of winding-up of company sworn by One M/s Narendra Raichan Shah; the director of Silpack Limited; herein **Interested Party Creditor**, and the annexures therein that the company is unable to pay its debt amounting to Kshs.1,522,052.15/= despite the fact that demand was made as per section 220(a) of the Companies Act and a decree issued by the court for the said amount against

the company. Nevertheless, no payment has since been made by the company towards settlement of the same.

[14] Furthermore, if the company could not manage to sustain its own operations how then would it manage to pay its debts? The said creditor who is an interested party in this petition avers that it is for its best interest that the company is not wound up. However that is not true. The company's operation ceased upon sale of its assets. It has therefore no other way of generating income to sustain its running and paying off its debts. In fact, legally speaking there is no company at all. The only way the creditor's interest can be protected is via a winding up order where an Official Receiver will be appointed who will identify the remaining assets and proceeds from the sale of the company, and its genuine creditors and liquidate the identified assets for purposes of paying off its creditors. Additionally, the Petitioner referred to the letter dated 6th June 2007 (**annexure SN8 of the 1st affidavit**) and addressed to the directors of Swan Millers Limited, where Honourable Nyachae writes to inform the said directors of how he managed the proceeds of the sale. In his last sentence he opines that;

“We should also consider selling the remaining two properties in Kisumu and Mombasa to meet any genuine liabilities.”

The contents of the above letter confirm further that the company is unable to pay its debts and only through sale of the company's assets can it meet its genuine liabilities.

f. Whether the firm of Nyachae & Company Advocates were duly appointed by the directors to act for the company in the said transaction and whether they received the proceeds of the same

[15] It has been established that, as per the directors' agreement, the company assets were sold to M/s Mombasa Millers limited for Kshs. 300,000,000/= by Honourable Simeon Nyachae and His son Michael Nyachae who stood as the vendors on behalf of the company. The transaction was done through the firm of M/s Nyachae & Company Advocates who the petitioner states were not appointed by the directors as required by the law. The Respondent on the other hand asserts that they were duly appointed to act for the company in the said transaction. However, no proof to the same has been presented before this Honourable Court. In addition, the company appointed Tact Corporate to supervise the said transaction yet they were never involved by the said firm of advocates during the said transaction. The proceeds of the sale of company assets were then received by the said firm of advocates and a letter dated 3rd November 2006 (**annexure SN6 of the 1st affidavit**) addressed to the general Manager of Credit Bank Limited from Honourable Nyachae informing him of the deposit of the proceeds of the said sale with his bank is proof that the same was received by the firm of M/s Nyachae & company Advocates. Further in his letter dated 6th June, 2007 addressed to the directors of the company (**marked “SN8” in the 1st affidavit**), at paragraph 2, he says;

“...when the proceeds for this transaction were received, it was found necessary to meet major obligations...”

This statement clearly confirms that he received the proceeds through the said firm of advocates as one cannot distribute what he does not have. The entire arrangement was against the regulations of the company as indicated under article 43 of the Company's Article of Association that;

On any sale of the undertaking of the company the director or the liquidators on winding up may, if authorized by a special resolution, accept fully paid or partly paid... for the purchase in whole or in part of property of the company ...

In the current case, there was no special resolution passed authorizing the said law firm to collect and/or distribute the proceeds of the said sale but they still did so.

g. Whether all the creditors paid by the company through the said firm of advocates were genuine creditors

[15] The company upon receipt of the purchase price and with instructions from Honourable Simeon Nyachae, proceeded to disburse the proceeds to some entities in the name of offsetting the company's debts without ascertainment of the company's liabilities, the services or goods offered to the company by the said entities and without a special resolution as spelt out under **article 43** of the company's Articles of Association. The letter dated 6th June 2007; referred to herein above, addressed to the directors of Swan Millers Limited and **Marked SN8**, indicates how Honourable Nyachae informed the Directors of the said creditors and how he managed the proceeds of the sale and enumerates the list of creditors he selected to be paid off, knowing very well that he was acting ultra vires his powers and without the knowledge of the petitioner and/or the Company's Managing Director as to who were the genuine Creditors, who ought to be paid first and why. In addition, the Respondent after the distribution of the proceeds of the sale could not account for the remaining balance of the same upon request by the Directors. These issues can only be addressed by the appointment of the Receiver Manager of the Company upon an Order of dissolution.

h. Whether the company is entitled to a winding up order

[16] According to the Petitioner, the facts of the case warrants the company is entitled to a winding up order under Section 219(c), (e) and (f) of The Companies Act. Section 219 (c) states;

A company can be wound up by court if it does not commence its business within a year from its incorporation or suspends its business for a whole year.

It has been proven hereinbefore that the company has not been in operation and/or carrying on business since it sold out its assets in 2006. Section 219(e) provides that a company can be wound up by court if the company is unable to pay its debts. The Petitioner stated that it has given sufficient proof to show that the company is unable to pay its debts and as such, and the interest of the interested parties- the creditors- would be carried through in the winding-up of the company. The company has already been sold, the only reprieve for the interested parties is to get their pay from the proceeds of the sale. As the matter stands now since 2006 Silpack Industries Limited has not been paid a total of Kshs. 1,552,052.15/-. That is proof the company is unable to pay its debts and the court should issue a winding-up order and a Receiver subsequently appointed. In any event, the company has been undergoing adverse financial difficulties; it has ceased operations; all its assets have been sold; and it can no longer carry on business or pay off its genuine creditors. For this reason it would be unjust and prejudicial to the petitioner if a winding up order is not issued as the company will be forced to start operations a fresh while it has no finances and are unable to pay its debts. The circumstances of the company are apt for winding up under Section 219 (f) which provides that:

“...a company can be wound up by court if the court is of the opinion that it is just and equitable that the company should be wound up.

The relevant law in regards to winding up a company under the principle of Just and equitable circumstances is in the case of **Re Garnets Mining Co. Ltd. (1978) KLR 224** as follows;

“The relevant law is this. A company may be wound up by this court if, among other things, the court is of the opinion that it is just and equitable to be wound up.”

The court went on to state in the said case that;

“Whether or not a company should be wound up by the court on the ground that it is just and equitable to wind up under section 219(f) of the companies act is a matter of discretion. The court's discretion in this respect is wide and must be exercised judicially. Each case depends on its own facts as they are at the time of the hearing; but, generally,

where a petitioner can show that he has lost confidence in the management of the company because it has a lack of probity, the court's discretion(in the absence of special circumstances) is likely to be exercised in his favour."

According to the Petitioner, the Directors of the Company have lost confidence in the management of the company and it is only prudent that the company be wound up. In addition vide the minutes **marked SN4** Hon. Nyachae, himself had suggested during the extraordinary general meeting of the members of the company that Swan Millers would have to be wound up. This was because he was well aware of the financial situation of the company and understood that with the situation at hand the same could not sustain its operations any longer. However he contradicts himself in his Affidavit and opposition to winding up petition by stating that he wants the company to continue trading. The averment, according to the Petitioner is malicious and self-defeatist especially coming from the Chairman who was the representative vendor of the assets of the company as well as the distributor of the proceeds thereof. Moreover, the Respondent has alleged without any proof or complaint having been made to the relevant authorities that the Petitioner misappropriated the Company funds. The entire sale of company assets and disbursement of the proceeds of the sale can only be addressed by the Receiver Manager upon winding up of the company. In sum, all evidence suggest that;

- i. The shareholders can no longer trade together.
- ii. That the machinery, principle tools of trade, the land in which the plant of the company was based have been compromised through disposition. In essence the company is not and cannot trade any further.
- iii. Despite the valuation of the company and the purchase price received therein, both parties in their pleadings have admitted that all the assets of the company save for the two properties; L.R No. MN/V/703, Mombasa and Kisumu Municipality/Block7/404 have been disposed.

Accordingly, the only remedy available for the parties herein is for the company to be wound up to enable each party's interests to be considered in so far as the disbursements of the fund and the sale of the other remaining two assets of the company, are concerned. The Petitioner has discharged its burden of proof and has shown-cause why a winding up order should issue against the Respondent. A winding up order should issue.

The Interested Party supports winding-up

[17] Silpack Industries Limited, is the Interested Party herein; the Creditor to the company. It filed its papers following the advertisement in the Standard newspaper dated 15th July 2008, calling for any creditor or contributory of Swan Millers to furnish their documents either in support of or opposition to the Winding Up, to be made by the 16th September, 2008 before the scheduled hearing of the petition on 11th November, 2008. By a Notice of Intention to Appear on Petition dated 5th September 2008 and filed on the 11th September, 2008, the Interested Party made its formal entry into these proceedings. The interested party, through its Director Mr. Naren Shah, swore an Affidavit in Opposition to the Winding Up on 5th September 2008. However, following consultations, the Interested Party thereafter on 26th September, 2014, withdrew the Affidavit in Opposition and instead filed one in support of the Winding Up of the company on 24th July, 2014. In order to underpin the entry of the interested party into these proceedings, it is important at the very outset, for it to establish the following;

- a. Whether the company was indebted to the interested party.
- b. Whether the company was unable to pay its debts to the interested party.
- c. Whether, in conjunction with petitioner, the interested party, creditor, is entitled to orders for winding up the company (Swan Millers).

- a. **Whether the company was indebted to the interested party.**

[18] The Interested Party filed suit vide a plaint dated 10th April 2008 (Annexure “NRS 1”) against Swan Millers in respect of goods sold and delivered in the year 2006 in the sum of Kshs.1,522,052.15 plus costs. The case is **C.M.C.C. NO.2150 of 2008 – Silpack Industries Limited vs. Swan Millers Limited**. Initially the Plaintiff sought to serve the resultant summons upon the Directors of the Defendant Company (Swan Millers). However those attempts were unsuccessful, thereby leading to the expiry of the Summons to Enter Appearance. The Interested Party thereafter applied for an extension of the validity of the summons through a Notice of Motion application dated 26th November, 2009 (Annexure “NRS 2”). The orders for extension were granted on 7th May 2010. In view of the unchanged difficult circumstances of locating the Directors of the Defendant Company, the Plaintiff sought the leave of the court to serve the summons by way of substituted service in a local daily newspaper (Annexure “NRS 3”). The application was heard and orders issued on 29th September, 2010. The requisite advertisement was placed in the Daily Nation Newspaper of 25th October 2010, formally serving Swan Millers notice to enter appearance within fifteen (15) days thereof (Annexure “NRS 4”). Swan Millers did not file appearance or defence. And so the Interested Party filed a Request for judgment dated 16th December 2010 (erroneously indicated as 10th December 2010 in the interested Party’s Supporting Affidavit), and judgment was duly entered against Swan Millers on 5th January 2011 and a Decree issued (Annexure “NRS 6-B”).

b. Whether the company was unable to pay the debt.

[19] Following the entry of judgment against the company in the lower court, the Plaintiff conveyed a Notification dated 9th March, 2011 to the company by registered post, informing the latter of the entry of judgment. See Annexure “NRS 6-A”. The same was posted through the company’s known Postal address. At this point the amount including interest due to the Plaintiff was Kshs. 2,140,249.86. Despite these endeavours, the company has not paid the debt due to the interested party to date. The debt has never been contested or unchallenged by the company. Therefore, the Company has been completely unable to pay the decretal sum owed to the interested party creditor to date.

(c) Whether the Interested Party Creditor is also entitled to orders for Winding up.

[20] The Interested Party Creditor submitted that the company has completely been unable to pay its debt arising from the decree in **C.M.C.C. NO.2150 of 2008 – Silpack Industries Limited vs. Swan Millers Limited**. Section 220, Companies Act defines what inability to pay a debt means; i.e.:

- a. ***“If a Creditor, by assignment or otherwise, to whom a company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum to sue and the company has three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.***
- b. ***If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part”***

Despite notification or demand for the payment of the debt, the company has failed to pay, for a much longer period than the stipulated period of three (3) weeks. Therefore, there exist strong circumstances that should enable this court to issue Winding-up Orders. Section 219, Companies Act lists the instances in which a company may be wound up, if,

(a) “.....

(b).....

(c) ***the company does not commence its business within a year from its incorporation or***

suspends its business for a whole year

(d).....

(e) the company is unable to pay its debts”

The company's indebtedness to the Interested Party goes back to the year 2006. And now the Interested party joins issues with the Petitioner and prays for the an order of winding up of the company to be issued by this Honourable court. Of importance is that the Interested Party needs to be paid its outstanding monies. Towards this end, it is the Interested Party's prayer that the remaining assets of the company namely' L.R.No.MN/V/703, Mombasa and Kisumu Municipality/Block 7/404 are protected and preserved from any dealings by the company, until its Winding up is finalized. The Interested Party also prays that its status as a legitimate Creditor for the purposes of these proceedings is duly confirmed and recognized by this Honourable Court.

Swan Carriers Limited Supported Winding-up

[21] Swan Carriers Limited is interested in these proceedings as a Creditor of Swan Millers Limited. It submitted that it has demonstrated by affidavit that Swan Millers Ltd is indebted to it in the sum of Kshs. 26,963,552.90 which Swan Millers Limited has defaulted in paying. The said debt accrued when Swan Carriers Limited provided transport services and supplied spare parts and fuel to Swan Millers Limited on credit basis from 30th October, 2004 to 31st August 2006. They submitted that the winding up of Swan Millers Limited is necessary to enable recovery of the debt owed to Swan Carriers Limited by sale of the assets of Swan Millers Limited. They relied on the decision in *In the Matter of African Safari Club Limited (2014) eKLR* wherein the learned Judge stated that;-

“Since the Petitioner's debt remains unpaid to date, and since no satisfactory explanation has been offered for the non-payment, it is only logical to conclude that the Company is insolvent and hence should be wound up”.

The debt owed to Swan Carriers Limed has been due since 31st August 2006, more than 8 years. No payment has been made by Swan Millers Limited despite demand having been made. The only logical conclusion is that Swan Millers Limited is insolvent and should be wound up. They prayed for an order of winding up to be issue.

The Company opposed winding-up

[22] The Company did not file submissions despite being granted b21 days to do so on 26.9.2014. It, however, filed Affidavit in Opposition of Petition which was sworn by Simon Nyachae, the director of both Kabansora Limited and the Company on 17th September, 2008. According to the said affidavit, Kabansora Limited is a shareholder of the Company and it holds 20,000 shares. He stated that he will conversant with the facts of the petition. He insisted that the Petition has never been served on the company and other shareholders as required in law. He averred that the Petitioner was always represented in the Company by a Mr. Share who also approved the sale of the company assets. The said Mr. Shah was the sole signatory of the transfer of the movable assets of the Company. Mr. Shah also executed the transfer of Kisumu Municipality/Block 3/190 and affixed the Company seal thereto. The Company assets sold through the Agreement dated 16th August 2006 were never valued at Kshs. 600,000,000 as alleged by the Petitioner. Mr. Nyachae also deposed that Mr. Shah and the other directors of the Company were given the first opportunity to identify a buyer and as a result Luna Limited was identified as the person to purchase the assets at Kshs. 300,000,000. Mr. Shah was also aware of all these happening and so the petition herein is just an afterthought to derive collateral and other extraneous ends. First, the Petitioner's representative and Managing Director, Mr. Shah mismanaged the Company's funds, and so he intends to use the petition to forestall the taking of forensic accounts of the Company which was agreed upon and has begun. Second, the petition

will interfere with vested rights of a third party. The assertion that there is a tussle on the Companies accounts is not true as the Company passed a resolution to appoint an independent firm of auditors to carry out the forensic audit to determine the cause of the company's financial difficulties.

[23] Mr. Nyachae swore more; that the Company retained the services of the law firm of M/S Nyachae & Company Advocates to act on its behalf in the sale and receipt of proceeds of sale of the company's assets. He annexed exhibit SN6-a letter from him to the Bank. Mr. Nyachae says that Mr. Shah and the other shareholders agreed on the retention of the said advocates in the transaction. Indeed, the said firm of advocates was the Company's advocate. He refuted claims that the said advocates did not account for the proceeds received. The allegation, according to Mr. Nyachae is irrelevant and in any event even if the said advocates did not account for the funds, there is remedy to seek accounts from them without invoking winding-up of the Company. He exhibited annexure SN7 on these facts. He took the view that the generalized allegations were untrue and the entities whose debts were paid off were genuine creditors of the Company. On the advice of his advocates, Mr. Nyachae deposed that Mr. Shah has perjured himself and the Petition is merely an abuse of the process of the court. The petition is also incompetent and should be struck out; so he deposed.

THE DETERMINATION

[24] I have considered all the evidence placed before the court by the parties. I have also considered all the legal arguments by parties and the applicable law on the subject matter of suit. This is a Petition for Winding-Up by Court under section 219 of the Companies Act. Section 219 provides as follows:

Circumstances in which company may be wound up by the court

A company may be wound up by the court if—

- a. ***the company has by special resolution resolved that the company be wound up by the court;***
- b. ***default is made in delivering the statutory report to the registrar or in holding the statutory meeting;***
- c. ***the company does not commence its business within a year from its incorporation or suspends its business for a whole year;***
- d. ***the number of members is reduced, in the case of a private company, below two, or, in the case of any other company, below seven;***
- e. ***the company is unable to pay its debts;***
- f. ***the court is of opinion that it is just and equitable that the company should be wound up;***
- g. ***in the case of a company incorporated outside Kenya and carrying on business in Kenya, winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business***

The relevant grounds are (c), (e) and (f) of section 291. Before I engage in the merits of the Petition, let me first determine its competence and compliance with the law as a preliminary issue.

Petition's Compliance with Law

[25] The record show that the Petition fully complies with rules 22 and 23 of the Companies (Winding Up) Rules on ***Presentation of petition and deposit*** and ***Advertisement of petition***. The only quarrel which the Company has fastened is on service. Service of Petition is governed by rule 24 of the Companies (Winding Up) Rules which states as follows:

24 Service of petition

- (1) ***Every petition shall, unless presented by the company, be served upon***

the company at its registered office, if any, and, if there is no registered office, at the principal or last known principal place of business thereof, by leaving a copy of the petition with any member, officer or servant of the company, or, if no such member, officer or servant can be found, by leaving a copy at such registered office or principal place of business, or by serving it on such member, officer or servant of the company as the court may direct; and, where the company is being wound up voluntarily, the petition shall also be served upon the liquidator, if any, appointed for the purpose of winding up the affairs of the company.

(2) *An affidavit of service of such petition shall be sworn and filed by the officer executing service thereof.*

Section 391(1) of the Act also provides for service of documents in the following manner:

A document may be served on a company by personally serving it on an officer of the company, by sending it by registered post to the registered postal address of the company in Kenya, or by leaving it at the registered office of the company.

The record shows that the Petition was duly served upon an officer of the Company one Mr. Surendra Chotabhai Patel, on 5th day of August 2008. He is an Executive Director of the Company. An affidavit of service to that effect was filed on 8th August 2008. The Company has even filed the necessary papers to the Petition. The Petitioner stated that it chose to serve another officer of the Company because one Harakchand Kachra Shah who verified the affidavit to the petition is also the Managing director of the company and one who runs the registered office of the company. It was, therefore, prudent, logical and in order to serve the said petition on another Director of the Company to avoid being accused of serving self in the matter. I have no quarrel with that reasoning because the law allows service on the appropriate officer of the Company. In line with the principles of justice to serve substantive justice, I find that service herein is sufficient for purposes of this petition and there is nothing which would prevent the court from adjudicating the real issues on merit. I will so proceed.

[26] I stated earlier that the Petition is grounded on three major circumstances, namely:

- i. ***That the company has suspended its business for a whole year;***
- ii. ***That the company is unable to pay its debts; and***
- iii. ***That there are sufficient reasons which should make the court opine that it is just and equitable that the company should be wound up.***

That the company has suspended its business for a whole year

[27] Although the Company was registered to carry out many other businesses, from the evidence presented before court, it is clear that the core business was milling. All the parties are agreed that the company owned movable and immovable properties including millers with which it carried out milling. The company was doing well until sometime in 2004 when it started experiencing financial difficulties. The company, through its directors agreed and passed a resolution to sell its properties. The company's assets were sold although the specific properties which were agreed to be sold are hotly contested. The Petitioner argued that the two properties namely L.R No. MN/V/703, Mombasa and Kisumu Municipality/Block7/404 as well as Copy rights, vehicles and machinery hired to Kisumu Plastic Limited were not among the properties which were agreed to be sold. Mr. Nyachae is of a contrary opinion and he says that Mr. Shah was involved in all resolutions and executed all the sale agreements for the movable as well as immovable properties in the agreement of 16th August 2006. I will reserve this dispute for later consideration. What is important at this juncture is the fact that the Company has suspended its operation for over a whole year, indeed, since 2006 it has not been in operation. The letter dated November 3rd 2006 (**annexure SN6 of the 1st affidavit**), written by Hon S. Nyachae as the Chairman of the Company wrote the following:-

“As you are aware, Swan Millers Limited has been sold to Mombasa Maize Millers”

There has been no official take-over of the Company, therefore, the fact that the assets of the Company were sold, and millers were sold to Mombasa Maize Miller, the Company literally ceased business in the sense of the law. During this period to date, the Company is said in law to have suspended its operations for over a whole year, which is a sufficient ground under section 219 of the Companies Act for the court to order a winding up of the Company. The material before the court is that the company is no longer carrying out its core business of milling and I doubt whether it is carrying out any other business. Although Mr Nyachae opposed the Petition, he did not say whether the Company is carrying out other businesses or at all. But let me discuss the other grounds before I make my overall impression of the matter.

Is the Company unable to pay its debt?

[28] As of law, a court will order a winding up of a company if it is unable to pay its debts. The Companies Act in Section 220 defines what inability to pay a debt means; i.e.:

- a. ***“If a Creditor, by assignment or otherwise, to whom a company is indebted in a sum exceeding one thousand shillings then due has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum to sue and the company has three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.***
- b. ***If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part”***

[29] Two Creditors, namely Swan Carries Limited and Silpack Industries Limited filed affidavits in support of the Petition. The former claims a sum of Kshs. 26,963,552.90 arising out of provision of transport services and supply of spare parts and fuel to the Company on credit basis from 30th October, 2004 to 31st August 2006. Despite demand made, the Company has failed to pay the debt. Silpack has provided evidence that it is owed by the Company a sum of Kshs. 1,522,052.15 plus costs for goods sold and delivered in the year 2006; the debt arises from a decree of court issued in ***C.M.C.C. NO.2150 of 2008 – Silpack Industries Limited vs. Swan Millers Limited***. The debt continues to attract interest as the Company is unable to pay it despite demand made. These two debts are legitimate for purposes of winding up the Company. Hon. Mr. Nyachae and the Company did not dispute these debts. Demand was made for payment of these debts but more than three weeks have lapsed and the Company has neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, therefore, in law the Company is unable to pay its debts. On this ground alone, an order for winding up should issue. The overall impression of all the foregoing is that there is every just and reasonable cause to order a winding up of the Company. Accordingly, I make an order of winding up the Company, SWAN MILLERS LIMITED. The official receiver shall accordingly proceed with the winding up in accordance with the law. It is so ordered. All the other issues which have been raised by Hon Mr. Nyachae and Mr. Shah on the property of the Company shall be dealt with within the process of the winding up. The question on retainer of M/S Nyachae and Company Advocates as well as accounts is a matter of official receiver in the collection of assets of the Company.

Dated, signed and delivered in court at NAIROBI this 11th February, 2015

F. GIKONYO

JUDGE

