REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Winding Up Cause No. 1 Of 2014

***Re* Interstate Petroleum Company Limited**

JUDGMENT

1. A petition to wind up Interstate Petroleum Company Limited (hereafter *the company*) has been presented by Africa Oil Corporation (hereafter *the 1st petitioner*), Africa Oil Turkana Limited (formerly known as Turkana Drilling Consortium Kenya Limited, hereafter *the 2nd petitioner*) and Africa Oil Kenya B.V. (formerly known as Lundin Kenya B.V., hereafter *the 3rd petitioner*). The petition is dated 2nd April 2012. It is predicated upon sections 218, 219 (e) and 220 of the Companies Act.

2. The gravamen of the petition is that the company is insolvent and unable to meet its debts; and, that it is just and equitable that it be wound up. The petitioners claim that the company is indebted to them in the sum of Kshs 4,915,221. The debt arises from costs awarded by the High Court at Kitale. A certificate of costs dated 7th June 2011 is exhibited. A formal notice was delivered at the registered offices of the company on 22nd June 2011.

3. It is pleaded that a period of more than three weeks has elapsed; and, that no payment is forthcoming. Those matters are set out at length in the petition and confirmed in the verifying affidavits of Keith Hill and James Phillips, directors of the 1st to 3rd petitioners respectively sworn on 9th May 2012.

4. The petition is contested by the company. Learned counsel for the company Mr. Mokua conceded that the company has not filed any formal response to the petition. The primary opposition to the petition has been from the contributories, and in particular, the 5th Contributory, Edward Kings Maina. The latter has filed grounds of opposition dated 27th July 2014 and a detailed affidavit sworn on 4th August 2014. There is another affidavit by the same deponent sworn on 21st October 2014. In a nutshell, he avers that the petitioners lack standing to present the petition, that the debt is disputed, that there are separate proceedings to impeach the decree giving rise to the debt, and, that the entire petition is actuated by bad faith and is incompetent.

5. A supporting creditor, number 0903658 B.C. Limited (formerly known as Centric Energy Corporation) supported the winding up proceedings. It has filed a deposition sworn by Donald Mahaga on 18th May 2015 and a list and bundle of documents dated 4th December 2014. The supporting creditor avers that the company owes it costs of Kshs 4,339,423 arising out of a decree in Kitale High Court JR 30 of 2010. A copy of the certificate of costs and the demand against the company are annexed.

6. The petitioners filed three bundles of documents or lists of authorities dated 14th January 2014, 18th November 2014 and 25th May 2015. The 5th contributory filed two sets of authorities dated 21st October 2014 and 1st December 2014. On 26th May 2015, I heard oral submissions from the learned counsel for

the petitioners and the supporting creditor. I also granted leave to the 5th contributory to address the court. For the record, the 5th contributory had filed a notice to act in person dated 31st July 2014. I have considered the application, depositions, and the rival submissions.

7. The legal parameters in a matter of this nature are well settled. Section 218 confers jurisdiction upon the High Court to wind up any company registered in Kenya. Under section 219 (e) and (f), a company may be wound up if it is unable to pay its debts; or the court forms the opinion that it is just and equitable that it be wound up.

8. Section 220 defines when a company is deemed to be unable to pay its debts. The debt must exceed *Kshs 1,000*; Demand has to be served at the registered office of the company for a period of *three weeks*; and, the company fails to *secure, compound or pay the debt* or to offer a satisfactory explanation to the creditor. When those conditions are met, the company is *deemed* to be *unable* to meet its debts. See *Re Azetiland Consultants Limited*, Nairobi, Winding Up Cause 14 of 2007 [2009] eKLR.

9. The petitioners must thus show there is a debt that has remained unpaid for three weeks of the notice. If as urged by the company or contributory that the debt is disputed, the company has to demonstrate that the dispute is *substantial* and *bona fide*. See *Halsbury's laws of England*, Vol. 7 (3), 4th Edition, 2004 (Reissue) paragraph 452. A winding up order shall not be granted where the company disputes it in good faith. The court must be satisfied that the dispute is based on substantial grounds. See also *Re Tanganyika Produce Agency* [1957] E.A. 241, *Re Ghelani Impex Limited* [1975] E.A 197. The latter decision is also good authority for the following proposition: it is not improper or oppressive for a judgement debtor to pursue winding up of the company while pursuing other alternative remedies. *Re Ghelani Impex Limited*, supra, at 199. The only caveat would seem to be the requirement of three weeks' notice; and, the equitable jurisdiction conferred by section 219 (e). So much so that if it would be unjust to the company or creditors, the court may decline winding up the company. See *Re Wildlife Shop Limited*, Nairobi, winding Up Cause 23 of 1981 [1981] eKLR, *Re Garnets Mining Co Ltd* [1978] KLR 224.

10. Applying the above principles to the present case, I find as follows. I have read the ruling of Koome J (as she then was) in Kitale, High Court JR 30 of 2010. The ruling is annexed to the deposition of Kings Maina sworn on 4th August 2014. The company was the *ex parte* applicant. It sued the Permanent Secretary Ministry of Energy and five interested parties. They were, Turkana Drilling Company Limited; Lundin Kenya Limited; Africa Oil Corporation; Platform Resources Inc; and, Centric Imaging Inc. On 16th December 2010, the application was dismissed with costs to the respondent and the five interested parties.

11. I am satisfied that the three petitioners were some of the interested parties. They are Africa Oil Corporation (*the 1st petitioner*), Africa Oil Turkana Limited (formerly known as Turkana Drilling Consortium Kenya Limited, *the 2nd petitioner*) and Africa Oil Kenya B.V. (formerly known as Lundin Kenya B.V.,*the 3rd petitioner*). The 5th contributory submitted that the current petitioners are *not* the ones who were awarded costs in the judicial review application. I think that is a red herring. I have studied the earlier affidavit of Donald Mahaga sworn on 8th March 2013. Turkana Drilling Consortium (K) Limited was incorporated on 13th April 2007. I have then seen the certificate of its change of name to Africa Oil Turkana Limited dated 21st October 2009. Lundin Kenya B.V. on the other hand was incorporated on 26th November 2007. It changed its name to Africa oil Kenya B.V as per the confirmation by the registrar of Companies dated 8th July 2009.

12. I thus find that the petitioners have standing to present the petition. The petition is verified by the two affidavits of Keith Hill and James Phillips as required by Rule 25 of the Companies (winding Up) Rules. From the affidavit of service of Peter Orwaru sworn on 25th June 2012, the petition was served on the company. The petition was advertised in the Kenya Gazette and one national newspaper. The relevant fees were paid to the Official Receiver. I am unable to hold that the petition as drawn and filed offends the Companies Act or Rules or that it is incompetent.

13. The petitioners had filed a single bill of costs. In a ruling delivered on 10th January 2011, the costs were taxed at Kshs 4, 915, 221. I have seen the certificate of costs dated 7th June 2011. Mr. Kings Maina submitted that the certificate of costs is not a decree; and that the petitioners should have moved the court under section 51 of the Advocates Act for entry of judgment on the taxed costs. I disagree. The costs awarded here were *party and party costs*; not advocate-client costs. Section 51 of the Advocates Act is thus inapplicable. The certificate for the party and party costs was for all intents and purposes a decree.

14. Like I stated earlier, the company has not filed any reply to the petition. There has been *no* appeal or application to set aside the certificate of costs in favour of the *three petitioners*. To be fair to the 5th contributory, there would seem to be proceedings to set aside the certificate of costs awarded to the *supporting creditor*. So much so that at the moment, there is *no* order staying the costs to the petitioner.

15. Although a tome of materials have been placed before the court, this petition turns on a very simple matter. The debt in this case exceeds Kshs 1,000. It is a debt of Kshs 4, 915, 221 due from the company to the petitioners. A formal demand of payment was made on the company on 22nd June 2011 as more particularly pleaded at paragraph 6 of the petition. More than three weeks have expired since the delivery of the notice. The company has not met the debt, secured it or compounded it; or, made a reasonable explanation to the creditors. I have reached the inescapable conclusion that the company is unable to pay its debts as defined by section 220 of the Companies Act.

16. The only other key question is whether the debt is disputed on *bona fide* and *substantial* grounds. For starters, the company never filed a reply. The company has not shown any effort or capacity to meet the debt in good faith. The reply by the 5th contributory and by Mr. Mokua, learned counsel for the company, is six-pronged: first, that the company has rights to exploration of crude oil reserves of 9.36 billion barrels in the disputed blocks 10BA, 10BB, 12A and 13T; secondly, that the petitioners have not sought to execute the decree in any other manner; thirdly, that the costs are being challenged separately before the Deputy Registrar and in Eldoret Civil Appeal 14 of 2015; fourthly, that the affidavit in support of the petition on behalf of Africa Oil Corporation is defective; fifthly, that the petition is *res judicata*; and , lastly, that the petition is not brought in good faith but meant to achieve a collateral purpose.

17. There are three petitioners here. I have dealt at length with their identities, change of name and capacity to bring these proceedings. Rule 25 of the Companies (winding Up) Rules requires that every petition be verified by an affidavit of the petitioner, and if there be *more* than one petitioner, by an affidavit by *one* of the petitioners. In this case, I have found the petition is properly before the court. As I have stated, all the petitioners filed a single bill of costs for the *party and party costs*. The debt in question is owed to the three petitioners. The company or the 5th contributory have not shown that they have assets to meet the debt or that they have made efforts to repay the debt. The oil reserves or exploration rights referred to may well exceed the value of the debt now due. But it is not lost on me that the exploration rights over those oil blocks were the subject of the judicial review proceedings. The company lost in those proceedings at the High Court in Kitale. The appeal to the Court of Appeal ran into headwinds. The notice of appeal was struck out. A motion for stay of execution of the High Court decision was dismissed by the Court of Appeal on 20th September 2013. That is clear from the annexture marked *EKOM6* in Mr. Maina's affidavit of 21st October 2014. It is true that the petitioners had lodged another petition for winding up on 14th October 2011. The petition was struck out on 15th February 2012. The main reason was that it had not been properly executed. That did not preclude the filing of the present petition or make this petition incompetent. I am unable to say the matter is *res judicata*.

18. The definition of *inability* to pay a debt under section 220 of the Companies Act is narrow and pointed. The point is that the company has not shown *substantial* or *bona fide* grounds disputing the debt. The onus to prove those matters fell squarely on the shoulders of the company. I stated that there has been *no* appeal or application to set aside the certificate of costs in favour of the *three petitioners*. The petitioners' counsel was categorical that the petitioners have not been served with any appeal. The proceedings before the Deputy Registrar referred to by the company and the 5th contributory are to set aside the certificate of costs awarded to the *supporting creditor* who was the 5th interested party in the

proceedings at Kitale High Court. That was the subject of a *separate* bill of costs and certificate of costs.

19. True, the petitioners have other remedies in execution of the decree. But they have a right to pursue the present action. It is not improper or oppressive for the creditor to pursue winding up of the company while pursuing other alternative remedies. *Re Ghelani Impex Limited*, [1975] E.A 197 at 199. The only caveat is the requirement of three weeks' notice; and, the equitable jurisdiction conferred by section 219 (f). The notice was delivered. I have no cogent evidence that the petitioners are acting in bad faith or intend to achieve a collateral purpose. I am then not satisfied that it would be unjust to the company or creditors to wind up the company in this case. See *Re Wildlife Shop Limited*, Nairobi, winding Up Cause 23 of 1981 [1981] eKLR, *Re Garnets Mining Co Ltd* [1978] KLR 224.

20. The upshot is that the petition is allowed. The company is wound up for inability to pay its debts under section 219 (e) of the Companies Act. I appoint the Official Receiver as the provisional liquidator. The costs of the petition shall be paid from the assets of the company.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 2nd day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Ms. F. Macharia for the petitioners instructed by Anjarwalla & Khanna Advocates.

Mr. Z. Mokua (Absent) for the company.

Mr. Edward Kings Maina (in person) for the 5th contributory.

Ms. Ruto for Mr. Leshan for the supporting creditor instructed by Daly & Figgis Advocates.

Mr. J. Kemboi, Court clerk.