



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 21 OF 2015

IN THE MATTER OF RUMORTH GROUP OF COMPANIES LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 OF THE LAWS OF KENYA

RULING

INTRODUCTION

1. The application before the court is pursuant to Rule 7 (2) of the companies (Winding Up) Rules, and is filed by the company Rumorth Group of Companies Limited for the following orders:-
 1. ***That the Honourable court be pleased to strike out the Petition.***
 2. ***That cost of this application be borne by the Petitioner.***
2. The application is premised on the grounds that the Petitioner herein lacks the *locus standi* to present this Petition as it is not a creditor, that the alleged indebtedness is disputed on bona fide grounds, and that the Petitioner has been brought for debt collection purpose.
3. The application is supported by affidavit of **Ruth Moraa Morara** sworn on **8th July 2015**.
4. The background to the application is that on 16th April 2015, the Petitioner petitioned this court for the winding up order winding up the company on the ground that the company was insolvent. The allegation of insolvency is based on the allegations that the company issued several local purchase orders to the Petitioner for the provisions of goods, which goods were duly delivered to the company who acknowledge the delivery. The company then issued several post dated cheques to the Petitioner which were not honoured upon the same being presented to the bank. The Petitioner alleges that the company is indebted to the Petitioner in the sum of Kshs.4,189,334.20 which amount the company has failed to pay despite demand because the company is insolvent, hence the Petitioner herein. The Petitioner is supported by a large volume of a bundle of documents allegedly in support of the Petition, including cheques issued to the Petitioner which were dishonoured upon presentation.
5. The Applicant's/Company's case is that the Petition is based on falsehood, and that there is no proof of debt to warrant the winding up of the company. The Company's case is that an audit report on the company for the period between January 2010 and October 2013 revealed the Petitioner herein was among the company suppliers who had been paid money for alleged supplies

not actually received in the company by a former director. (Audit report attached and marked 'RM1'). In receipt of this petition, the company further ordered another audit report to be carried out specifically on the Petitioner and Shethia Industrial Chemicals Limited based on the documents filed by the said parties. The report further reveals that more irregularities in the supplies ordered, supplies actually delivered, and suppliers not actually received by the company but invoiced, discrepancies in the quantities ordered, received and invoiced. (audit report attached and marked 'RM1' and supplementary audit report for the period 1st Jan 2010 – 30th October 2013 attached marked as 'RM2'). As a result of the report received by the company, the debts allegedly by the Petitioner and the Shethia Industrial Chemicals Limited are highly disputed. The Company's case is that where the debt is disputed, the Petitioner does not qualify as Creditor who can thus rightly file the Petitioner as in this particular case. The Company's case is that the Petitioner has other legal effective alternative remedies for debt recovery. The company is not insolvent as alleged by the Petitioner since it is owed large sums of money by many of its suppliers. (marked 'RM3' is a copy of summary of its debtors balances as at 30/04/2015).

The Company's/Applicant's attached the Reports the result of the said investigations.

6. The Petitioner/Respondent has opposed this application vide a replying affidavit of **Abotular Venkata Satyanarayana Vasu** sworn on **10th August 2015**. The Petitioner's case is that the goods herein were delivered and duly received by the company as far as 2010 with the last goods being delivered in 2013 and no such claim has ever been raised by the company for the filing of this petition. Further the company has completely ignored the fact that it issued cheques which were dishonoured by the bank with the last cheque being banked as far back as 20th March 2014. The cheques were dishonoured for insufficient funds which indicates clearly that the company is not dealing in good faith and had no intention of settling the debts rightfully due. The Petitioner states that even after the cheques were dishonoured, no reason was given by the company. It is clear therefore that the issue of fraud is fictitious and created solely for the purpose of this winding up petition. The Petitioner claims that the claim for fraud is not supported by any documentation whatsoever, the said report is not signed by the maker and the deponent is not the marker of the report.
7. Parties filed written submission which I have considered. The only issue I raise in order to determine the application is whether or not the debt the subject matter of the Petition herein has been ascertained to provide *locus standi* to the Petitioner.
8. I have considered the authorities filed by the parties in support of their positions. Under rules 7 (2) of the Companies (Winding UP) Rules) a Petition to wind up a company may only be granted where there is no dispute as to the debt. Where debt is yet to be ascertained, the Petition cannot be granted.
9. I have noted that the Petition is supported by a big bundle of documents and also cheques which were allegedly dishonoured. It is important to note that this court does not have the liberty to go through those documents and then find that the Petitioner is owed the debt. The documents presented before this court are those documents which the party relying on the same may use to prove its case. The court has no capacity, alone, to peruse that bundle and find that the Petitioner is owed money, leave alone how much. In other words, the Petitioner is attempting to use the company's winding up court as a debt collection court. What the Petitioner ought to have done is to establish a debt by filing a separate cause against the company and securing judgement and a decree. If the company then fails to satisfy the decree upon demand, then the Petitioner could file this petition. This court is, however, aware that where the debt is not denied or is not disputed, or where the disputation of a debt lacks basis, a Petition to wind up a company may be granted. In the instant case, however, the Petitioner appears to be using this court to ascertain the debt for it.
10. It is also to be noted that the applicant has disputed the alleged debt, and has commissioned the reports to disparage the debts. Those reports may not contain the whole truth, but they are evident that the debt is seriously disputed and cannot be the basis of granting the Petitioner herein. In the case of **Mann & another Vs Colstein & Another [1968] ALL ER**, the court held as follows:-

“as the existence of debt on which each winding up petition was founded was disputed on

grounds showing a substantial defence requiring investigations, the Petitioner did not establish that he was a creditor and thus had the locus standi to resent the Petition and the companies court was not the appropriate court to decide the dispute; accordingly, the presentation of the petition was an abuse of the process of the court. . .”

11. It is the finding of this court that the debt herein is disputed on some substantial grounds, that is, whether or not the alleged debt is due as alleged, or at all. It is my position that a winding up court ought not to be preferred in a case where the Petitioner has a remedy in filing a claim in court against the company for such alleged debt. The winding up provisions of the companies act should not be used to blackmail companies through threat of preferring winding up proceedings every time a company disagrees with a would be creditor or every time a company denies indebtedness. In fact, I am not even persuaded that the company herein is insolvent.
12. For the foregoing reasons, the Petition herein is struck out. Each party to bear own cost of both the Petition and this application.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 4th DAY OF DECEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

M/s. Maitei for Petitioner

M/s. Ndundu for Company

Teresia – Court Clerk