REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

WINDING UP CAUSE NO. 5 OF 2008

IN THE MATTER OF NAIROBI MINERAL WATER CO. LTD

AND

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

LAWS OF KENYA

R U L I N G

1. For the determination of the Court is the application by the Applicant dated 14th November, 2008 brought under certificate of urgency and pursuant to the provisions of **Section 203** of the *Companies Winding Up Rules* and **Order VI Rule 13(b) and (d)** of the *Civil Procedure Rules*. The Applicant prays for, inter alia, the striking out and dismissal of the Petition by Top Pak Ltd, (hereinafter referred to as the Petitioner), ostensibly on the grounds as set out in the application. The Applicant contends that the Petitioner's Petition was predicated upon a disputed debt and that the same was thus an abuse of the process of the Court.
2. The application is further predicated upon the affidavit of **Mohammed Hussein Dossani** sworn on 14th November, 2008. It is deponed to therein that the Statutory Demand dated 2nd November, 2007 and served on 20th November, 2007 was neither served at the Applicant's registered office nor or on any of the Directors and that the amount claimed under the Petition, Kshs. 4,624,966.40, is disputed and is a debt owing to the Petitioner. The Applicant had previously filed an affidavit dated 7th July, 2008 in opposition to the Petition, in which the contents of the supporting affidavit were reiterated, and further that the Applicant was under duress and threat from the Petitioner to pay the disputed sum of Kshs. 4,246,037/-. The Applicant contended that, on 22nd February, 2007 the Petitioner's representatives, namely Mr. Dinesh Shah and Mr. Parit Shah, visited their premises in the company of two C.I.D. Officers, who forced them to either sign an agreement of admission of debt, or be arrested. The Applicant opted for the former, but subsequently stopped the post-dated cheque that had been signed under duress.
3. In opposing the application, the Petitioner filed its affidavit in response sworn on 2nd October, 2009. The Petitioner contended that the application is an abuse of the process of the Court. Further, it attested that the amount claimed was acknowledged and admitted by the Applicant in its letter dated 22nd February, 2007. It was further deponed that the Petitioner never repudiated or cancelled any arrangement with the Applicant, but that it was forced to stop supplying goods to the Applicant due to an increased frequency of bouncing cheques. Further, that the Applicant had never complained, nor notified the Petitioner, of any defective stock that it had supplied. It also contended that the agreement signed on 22nd February, 2007, at the Applicant's premises, was at the Applicant's request thereto and that at no time was there any coercion by any parties

whatsoever. The agreement was entered into freely and willingly. Further, it was averred that the Applicant has, in any event, admitted to owing at least Kshs. 3,127,785/- which is in excess of the Kshs. 1,000/- stipulated under statute for which a period of twenty-one (21) days had lapsed without the Applicant making good the debt.

4. **Rules 202(1) and 203** of the Companies Winding-up Rules provide for the invalidation of the proceedings involving a Petition and the inherent jurisdiction of the Court to issue directions on issues not specifically provided for under the Act. For example, **Rule 24(1)** sets out in clear terms how service of the Petition is to be effected upon the recipient - either by (i) leaving the same at the Company's registered offices; or (ii) the principal or last known principal place of business thereof or (iii) serving it upon any member, officer or servant of the Company.
5. The Applicant contends that **Rule** that it was not properly served with the statutory demand notice, and such was not in accordance with the procedure as set out therein. It alleges that the statutory notice was served upon one **Nishal Shah,** and thus both the statutory notice and Petition were incompetent and incurably defect for want of compliance with **Rules 10 and 25** of the High Court *Winding Up Rules*. It further relied on the case of **Re Standard Ltd *ex-parte* Tricom Paper International BV (2002) 2 KLR 644.** The Applicant further contended that the Petition was predicated upon a disputed debt and was thus without merit and should be struck out. It relied on the aforementioned case **Re Standard Ltd** (supra).
6. With regard to the issue of service of the statutory notice, the Petitioner contended that the application to strike out was brought ostensibly to scuttle the hearing of the Petition. It further contended that the Applicant admitted service of the statutory demand in paragraphs 3 and 4 of the Affidavit in support of its Application and its said Affidavit in Opposition to the Petition respectively, as well as the letters dated 21st November, 2007 and 7th December, 2007 marked as MD-4 in the Affidavit in Opposition. It is averred that the acknowledgment vitiates any objection by the Applicant as to the service of the statutory demand and that the objections raised are unsupported. It asserted that the provisions of service of the Petition are provided for under **Rule 220** of the *Companies Winding Up Rules* and that the Applicant had neglected to pay the claimed amount within the stipulated period. It enunciated further that **Rule 24(1)** does not stipulate service of statutory demand upon a Director, but at the registered office of the Company. It also contended also that service was not effected upon the registered office of the Applicant of its own fault or omission but acknowledged that the attempt to so serve proved futile and unsuccessful.
7. **Order 2 Rule 15(a)** of the *Civil Procedure Rules*, as read together with the authority of **D.T Dobie & Company Ltd –vs- Muchina & Another (1982) KLR 1** provides for the procedure, as well as the principles that guide the Court in applications for the striking out of pleadings. It provides that the Court will exercise its jurisdiction with caution and such shall not be exercised capriciously to the detriment of any of the litigants or parties to a matter. The Court is further guided by the principles espoused under **Sections 1A and 1B** of the *Civil Procedure Act* for the equitable, expedient and just determination of issues. In exercise of the overriding objective, the Court in determining an application for striking out, will consider the particular circumstances of the matter and issue or make orders accordingly. In **D.T Dobie & Co. Ltd v Muchina & Another** (supra) the Court held that:

   "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment."

   In following the provisions under **Order 2 Rule 15(a)** of the *Civil Procedure Rule,* the Court of Appeal further held that:

   "**If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it."**

8. Further, the Court of Appeal in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others (2013) eKLR** ruled on an application to strike out the pleadings for failure to comply with **Rule 77** of the *Court of Appeal Rules*, as

follows:

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Yet the period prior to 2010, when the overriding objective principle and the Constitution were promulgated, striking out of pleadings, as demonstrated by the cases cited by the respondents, for reasons that were purely technical was the rule rather than the exception. And this Court perfected it. This is demonstrated by the brief (1/4 page) decisions cited by the respondents in Augustino Mwai V. Okumu Ndede, Nbi Civil Appeal No. 42 of 1995, Joseph Kinoti V. Aniceta Ndeti Nbi Civil Appeal No. 130 of 1995 and Samuel Wakaba V. Bamburi Portland Cement Civil Appeal No. 130 of 1995, all decided between 1995 and 1997. Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

In dismissing that application to strike out the Petition , the Court referred to the case of **Githere v Kimungu [1976 – 1985] E.A. 101**on the general rules of practice as well as **Abdirahman Abdi also known as Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd. & 6 Others, Civil Application No. Nai. 173 of 2010**, **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999** and **Joseph Kiangoi v Waruru Wachira & 2 others, Civil Appeal (Application) No. 130/2008.** Such cases relate to the applicability of the overriding objective as provided under **Sections 3A and 3B** of the *Appellate Jurisdiction Act*, similar to **Sections 1A, 1B and 3A** of the *Civil Procedure Act*.

9. The Petitioner, in this instance, has established that indeed it had endeavored in serving the statutory demand letter upon the Applicant at its registered office and that the attempt proved futile as the address where it intended to serve, (as detailed in the affidavit of **Simwa Fenzali)**, was provided through a search at the Company Registry but it turned out that the address was incorrect. **Rule 202(1)** of the *Winding Up Rules* reads and provides that no proceedings shall be invalidated by reason of any informal irregularity unless the Court established that substantial injustice will be occasioned by such defect or irregularity. The Petitioner has been able to establish that indeed the Applicant had received service of the statutory demand, as evidenced by the letters dated 21st November, 2007 and 7th December, 2007. In the said letter dated 21st November, 2007 , it was stated *inter alia:*

“RE: Statutory Demand Letter dated 2nd November, 2007

We have received your above demand letter on 20th November, 2007 and have recorded its content.

The demand letter has been forwarded to our advocates and would be duly replied with within the 21 days, which is before 11th December, 2007.

Yours faithfully,

For and on behalf of,

Nairobi Mineral Water Co. Ltd”.

That letter was signed by the Manager, for and on behalf of the Applicant. The Manager is in the employ of the Company, and duly acknowledged receipt of the demand letter, and I find that he was accordingly served therewith. Further, in the letter dated 7th December, 2007, the Advocates representing the Applicant wrote to the Petitioner stating as follows:

"We act for Nairobi Mineral Water Co. Ltd and refer to your letter dated 2nd November, 2007 with instructions to address you as hereunder."

In both the aforementioned letters, the Applicant does admit, and so does its appointed firm of Advocates, that they both received the demand letter dated 2nd November, 2007. In my view, the Applicant cannot now refute service of the demand letter by the Petitioner, despite its insistence that the same was not served directly upon the registered address of the Applicant. **Rule 24(1)** provides for a different method of service, (albeit that of a Petition), which the Petitioner employed, after failing to serve at the Applicant's registered address.

10. With regard to the issue of the disputed debt, the Applicant admits that it is indeed indebted to the Petitioner, but not in the amount as claimed. The letter dated 7th December, 2007, reads as follows:

    "That our client records show that the debt outstanding is Kshs. 3,127,785/- and not Kshs. 4,624,966.40 as demanded by yourselves. This is because you waived interest and accepted payment of Kshs. 500,000/- on account.

    Our client proposes to make monthly installments of Kshs. 100,000/- and review the figure upwards as and when the finances permit. The request is no way an admission that our client is unable to pay its debt."

The Applicant contends that the amount is disputed and cannot therefore be the subject of a Winding-up Petition, as was stated and reiterated in the Replying Affidavit and the Affidavit in Opposition at paragraphs 4 and 5 respectively.

11. In its turn, the Petitioner relied upon **Section 220** of the *Companies Act*, which reads:

    "A company shall be deemed to be unable to pay its debts–

a. **if a creditor, by assignment or otherwise,** ***to whom the 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 so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor*****;** (Emphasis mine).

In the demand letter dated 2nd November, 2007, the Petitioner demanded for Kshs. 4,624,966.40. The same was claimed at paragraph 5 of the Petition.

12. The Applicant in its letter dated 7th December, 2007 admitted that it was indeed indebted to the Petitioner but in the amount of Kshs. 3,127,785/- and not the disputed amount of Kshs. 4,624,966.40. But according to the provisions of **Section 220** of the *Companies Act*, once the Petitioner serves the demand letter claiming debt as a creditor, the Respondent (in this instance the Applicant) is obligated to comply within twenty one (21) days, failure to which it shall be deemed as being unable to pay the debt. The Applicant has disputed the amount of the debt, not that it does not owe money to the Petitioner. Such raises issues for ventilation before Court. As reiterated in **D.T Dobie & Co. Ltd v Muchina & Another** (supra) and as provided under **Order 2 Rule 15(a)**, if there is any semblance of a cause of action, which is curable by an amendment, the Court will allow the matter to be heard and determined on its merits. Further, following the dictum of the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and**

Boundaries Commission & 6 Others (supra) the discretion of the Court to strike out a matter ought to be exercised judicially, in the interest of justice and in achieving the overriding objective as provided under **Sections 1A and 1B** of the *Civil Procedure Act*.

13. The upshot of the above is that, I find that the Application for striking out is without merit and is hereby dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 15th day of May, 2014.

J. B. HAVELOCK

JUDGE