



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING UP CAUSE NO. 10 OF 2004

IN THE MATTER OF : EAST AFRICA POWER MANAGEMENT LTD

AND

IN THE MATTER OF : THE COMPANIES ACT (CAP. 486)

RULING

1. By this Ruling the Court is considering the Petitioner's Notice of Motion dated 5th December 2012 and the Respondent's Preliminary Objection dated 22nd March 2013.

BACKGROUND

2. Petitioner filed this Winding Up Cause on 30th November 2004 against East African Power Management Ltd (the Company). The grounds upon which Petitioner sought that Winding Up are as follows-

“5. As at 5th November, 2004, the Company was indebted to your Petitioner in the sum of K.Shs.2,744,119/- plus interest thereon at court rates being amounts due and owing by the company to your Petitioner consequent to the taxation of your Petitioner's Bill of Costs filed in the Mombasa High Court as Miscellaneous Application Numbers 505 of 2004 and 506 of 2004 (hereinafter the “Bills”), which Certificates of Taxation are annexed to the Verifying Affidavit herein.

6. **Your Petitioner has made several requests to the Company beginning with service on the Company of his Fee Note(s), and subsequently service on the Company of the Bills hereabove referred to, but the Company has failed and/or neglected to either defend the Bills and/or to pay or satisfy the same, despite a director of the Company who was sued together with the Company having defended the Bills in person.”**
3. Petitioner on or about 7th December 2004 obtained an ex parte order appointing Eric Masese as an interim liquidator. That order was however stayed by an order issued by this Court on 15th December 2004 following the Company's Notice of Motion dated 9th December, 2004.
4. The Court in the interim entertained a Preliminary Objection filed by the Petitioner objecting to the Company's Notice of Motion dated 9th December 2004. That Objection was dismissed. It is important to note the prayers sought by that Notice of Motion dated 9th December 2004. They

were:-

“1.

2.

3. **THAT pending the hearing of the Motion, this Honourable Court be pleased to stay the execution of the Order granted on the 8th December, 2004 appointing Eric Masese as an Interim Liquidator;**

4. **THAT this Honourable Court be pleased to strike out the Petition dated 29th November, 2004 and the Chamber Summons dated 3rd December, 2004 and all consequential orders be vacated and/or set aside;**

5.”

5. The Court by its Ruling delivered on 6th September 2012 granted the above orders in the Notice of Motion dated 9th December 2012 and thereby struck out the Winding Up Petition filed herein with costs.
6. It is then that the Company filed the Party & Party Bill of Costs dated 30th October 2012.
7. It is that Bill of Costs that provoked the Petitioner’s Notice of Motion being considered in this Ruling.

Notice of Motion dated 5th December 2012

8. By that Notice of Motion Petitioner seeks the striking out of the Company’s Party & Party Bill of Costs. The Notice of Motion is supported by the grounds-
 - **That the cause herein is resjudicata.**
 - **That this claim was settled by consent in Mombasa High Court Admiralty Cause No. 13 of 2004.**
9. The Notice of Motion is supported by an affidavit of Petitioner which in my humble view makes swiping remarks without supporting them with evidence. In making those swiping remarks Petitioner has in my view muddled up issues. This is what Petitioner deponed in his affidavit-
 - **THAT it was at all times material hereto understood that the Applicant company was being sued as an agent of “The Owners of the Motor Vessel Sky Two”, who as principals had instructed the Applicant company herein to deposit with the firm of Steve Kithi & Co., Advocates the original documents of registration and ownership over the said Motor Vessel “Sky Two” as security for legal fees.**
 - **THAT pursuant to the above undertaking, the firm of Steve Kithi & Co., Advocates in seeking to recover the costs taxed in the said Bills, did file the present Winding Up Petition against the Applicant company as agent, and contemporaneously did file a Mombasa High Court Admiralty Cause No. 13 of 2004 against the “Owners of the Motor Vessel Sky Two” as principal.**
 - **THAT on the 23rd December, 2004, Mr. Khanna for the Applicant company did argue a Preliminary Objection to the present Winding Up Cause wherein he averred inter alia that the present Winding Up Cause should be struck out or dismissed because “there are several suits filed claiming the same amount” and that a single claim is only recoverable once.**

- **THAT other suits claiming the same amount as alleged by Mr. Khanna was in fact the Mombasa High Court Admiralty Cause No. 13 of 2004 against the “Owners of the Motor Vessel Sky Two”.**
- **THAT on the 18th January, 2005, the Honourable Lady Justice Khaminwa did dismiss the Preliminary Objection raised by Mr. Khanna and allowed this Winding Up Cause to proceed contemporaneously with Mombasa High Court Admiralty Cause No. 13 of 2004 against the “Owners of the Motor Vessel Sky Two” on the understanding that whereas both suits claimed the same amount, the claim sum would only be payable upon conclusion of the either of the two suits, whichever was concluded earlier.**

Annexed marked “SKN-1” please find a copy of the ruling dated 18th January, 2005.

- **THAT on the 11th March 2005 the Honourable Lady Justice Khaminwa did deliver a further Ruling in Mombasa High Court Admiralty Cause No. 13 of 2004 against the “Owners of the Motor Vessel Sky Two” wherein the issue of the claim sum herein being the subject of more than one suit was argued exhaustively and where the learned judge stated on page four of her Ruling inter alia that “A party is entitled to pursue his claims both from principals and sureties/guarantors and only one judgment is recoverable”.**

Annexed marked “SKN-2” please find a copy of the Ruling dated 11th March, 2005.

- **THAT in the same Ruling referred to in paragraph nine (9) above, the Learned Judge continued to enter Judgement with costs and in favour of the Claimant therein, to wit, Steve Kithi & Co., Advocates thereby rendering the cause of action in the present Winding Up Cause res judicata.**
- **THAT to my great surprise, the Applicant Company continued to litigate in the present Winding Up Cause for the next seven (7) years to the present date even though the cause of action had been satisfied in the Admiralty matter that had been filed against their Principals who had been condemned to pay costs and in the process the Applicant Company’s importunate litigation has resulted in the consumption of vast amounts of judicial time.**

10. The Company filed statements of Grounds of Opposition to the

effect that Petitioner failed to inform the Court that the debt due in respect of this Winding Up Cause had been paid and that Petitioner, who is an Advocate of the High Court, breached his professional duty in failing to withdraw this Petition.

Petitioners Arguments

11. Petitioner filed written submissions which were further highlighted before the Court.

12. Petitioner submitted that the Company was estopped from filing the Bill of Costs because this Petition remained in abeyance whilst parties negotiated a consent in respect of Admiralty Cause No. 13 of 2004. That the said admiralty matter is similar to this Petition and since the consent order in favour of Petitioner in **Admiralty Cause No. 13 of 2004** the Company has not filed an appeal against it.

The Company’s arguments

13. The Company by its written submissions argued that the submissions made by Petitioner had been made when the Court considered the Company’s Notice of Motion dated 9th December 2004 which was the subject of this Courts Ruling of 6th September 2012 by which Ruling the Winding Up Petition was struck out with costs. Further the Company denied ever being an agent of the

Defendant in **Admiralty No. 13 of 2004**.

Analysis and determination

14. The Party & Party Bill of Costs filed by the Company seeks costs awarded by this Court by its Ruling of 6th September 2012 to the Company. To date Petitioner has not filed an appeal to that Ruling nor is there a stay to the recovery of those costs. Having that in mind the submissions that that recovery is resjudicata or that the Company was an agent to the party in the Admiralty matter falls by the way side and have no merit. On the converse it is Company's submissions that the recovery of costs is resjudicata because it had been considered by this Court when this Court delivered its Ruling on 6th September 2012. The Company argued that that ground is not available to Petitioner. Petitioner on 8th April 2011 argued as follows-

“Consent entered into in the Admiralty Cause involved settlement of the claim in this favour (sic) of the Petitioner. When a matter is settled by payment from one party to the other, the party cannot turn around and claim costs.”

The Court considered that submission and proceeded to strike out the Petition with costs to the Company by its Ruling of 6th September 2012. Petitioner cannot again rely on those very submissions in support of Notice of Motion dated 5th December, 2012.

15. Over and above that it was the Petitioner who should have explained why he filed this Petition and also the claim in **Admiralty No. 13 of 2004**, if the substratum of the claim in both were the same. And if indeed the Admiralty matter was settled, Petitioner should have negotiated a settlement of this Petition instead of waiting for it to be struck out with costs. Having had the Petition struck out with costs Petitioner cannot block the recovery of those costs in the manner he seeks by his Notice of Motion.

16. There is also no evidence before this Court of the agency relationship between the company and the Defendant in the Admiralty matter. Even if there was that would not block the recovery of costs by the Company.

17. It is because of the above finding that the Company's Preliminary Objection is upheld. In that Preliminary Objection the Company stated that this Court has no jurisdiction to hear and determine Petitioner's Notice of Motion. That indeed it is correct because costs were awarded by the Ruling of 6th September, 2012 and Petitioner has not appealed against that award.

18. The Notice of Motion dated 5th December 2012 is without merit and is dismissed with costs to the Company.

DATED and DELIVERED at MOMBASA this 15TH day of MAY, 2014.

MARY KASANGO

JUDGE