



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**WINDING UP CAUSE NO. 13 OF 2013**  
**IN THE MATTER OF CABLES & PLASTIC LIMITED**  
**AND**  
**IN THE MATTER OF THE COMPANIES ACT CAP. 486 LAWS OF KENYA**  
**J U D G E M E N T**

1. The Petitioner **SITIMA PRINTERS & STATIONERS LIMITED** brought this Petition on **7<sup>th</sup> August 2013** alleging that on diverse dates beginning the year 2006, the Petitioner supplied to the company various stationery products and office materials at the request and instance of the Company and that as at 20<sup>th</sup> October 2012, the Company owed the Petitioner the sum of Kshs.1,589,227.00. It is alleged that the Company has severally admitted the debt and has made promises to pay the same but to no avail. The Petitioner further alleges that the Company is insolvent and unable to pay its debts and should therefore be wound up. In that regard the Petitioner made the following prayers:-
  - a. *That the Cable & Plastics Limited be wound up by the court under the provisions of the Companies Act.*
  - b. *That such order may be made in the premises as shall be just.*
2. Together with the Petition, the Petitioner filed a Notice, to the whole world about the filing of the Petition for the winding up of the Company. A notice of the Petition was also advertised on the Standard Newspapers of 18<sup>th</sup> November 2013, and the application was served upon the Company who then appointed an advocate to represent it in the Petition. The Company supports the Petition.
3. There are two Creditors who, upon the said Notice, also joined the Petition herein. The first one is CHEMRAW EAST AFRICA LIMITED who alleges that the Company owes it a debt of Kshs.577,678.53 on account of goods sold and delivered. The said Creditor opposes the Petition arguing that if the Petition is allowed and the Company is wound up it shall not be able to recover the said sum of Kshs.577,678.53 due and owed to it by the Company. In the circumstances, the Creditor prays that the Petitioner seeks other ways of recovering the money due and owing to it from the Company other than by winding up the Company.
4. The second Creditor is Kenya National Trading Corporation Limited. It alleges that the Company owes it Kshs.2,768,452/52 which has not been paid and so the second Creditor supports the Petition for the winding up of the Company.
5. Parties made oral submissions before me on 13<sup>th</sup> March 2014. Mr. Nyawera for the Petitioner submitted that the Company cannot pay its debt and is therefore insolvent and should be wound up under Sections 219 and 220 of the Companies Act Cap 486. On this submission he was supported

by Mr. Patel, counsel for the Company, who submitted that indeed the Company is indebted to the Petitioner and to the two Creditors and that the Company is insolvent and cannot pay its debts.

6. Mr. Sagini counsel for the second Creditor also supported the Petition submitting that the Company is insolvent and cannot pay its debts.
7. The only party who opposes the Petition is the first Creditor. Mr. Kamau for the first Creditor submitted that if the Company is wound up, they would not be able to recover Kshs.577,675.53 owed to them. He further submitted that the first creditor has sued the Company in Civil Case Number 422 of 2012 and which suit the Company has opposed. He submitted that the Petitioner should find some other ways of getting its money from the Company other than through the winding up process, and that in any event the Company should not be wound up when the above Case Number 422 of 2012 is still pending.
8. I have carefully considered the Petition. It is not in doubt that the Company is insolvent and cannot pay its debt. So the insolvency status of the Company is an agreed issue by all the parties.
9. Section 219 of the Companies Act outlines circumstances in which a Company may be wound up by the court. Among them at **paragraph (e)** is where -

***“the Company is unable to pay its debts.”***

10. Section 220 of the same Act partly states that a company shall be deemed to be unable to pay its debts:-

***“(a) if a creditor . . . to whom the company is indebted in a sum exceeding one thousand shillings then due has served on the company . . . a demand . . . requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum . . .***

***(c) if it is proved to the satisfaction of the court that the company is unable to pay its debts . . .”***

11. It has been proved to my satisfaction that the Company is unable to pay its debts. Indeed even the Company agrees it cannot pay its debt. In the absence of any collusion between the Petitioner and the Company – and there is no impression in my mind that there is any collusion – this issue is not in doubt.
12. The only issue the court needs to consider is the submission by the first Creditor that it has a pending case in court where it has sued the Company and the Company is defending the suit, and the Company should not be wound up when the case is still pending. This could be a valid submission if there was indeed the proof of such a case.
13. In the affidavit of **STEFANOS EGZIABHER**, a director of the first creditor, filed in court on **16<sup>th</sup> December 2013** there was never any such averment about a pending court case. There are many attachments to that affidavit. There is no attachment relating to any case in any court. The existence of such a case was first introduced by the first creditor’s counsel during the oral submission. This is not a proper procedure for bringing such evidence. I therefore cannot allow or admit that kind of evidence. However, more importantly Section 223 of the Companies Act states the position where there are pending court proceedings against the Company to be wound up.

***223 “At any time after the presentation of a winding up petition, and before a winding up order has been made, the company, or any creditor or contributory, may –***

- a. . . .
- b. ***Where any other suit or proceeding is pending against the company, apply to the court having jurisdiction to wind up the Company to restrain further proceedings in the suit or proceeding and the court to which application is so made may, stay or restrain the proceedings on such terms as it thinks fit.”***

Needless to add, no such application was either made to this court or or to the court where the suit is alleged to be pending. This allegation therefore cannot be a ground for refusing to allow the Petition.

14. In the upshot, the Petition must succeed. I make the following orders:-

- a. *That the CABLE & PLASTICS LIMITED be and is hereby wound up by the court under the provisions of the Companies Act.*
- b. *I herewith appoint Official Receiver in bankruptcy to be Official Receiver for winding up purposes under Section 230 of the Companies Act.*
- c. *The costs of the Petition including the two Creditors costs shall be paid by the Company.*

**DATED, READ AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Malesi holding brief for Nyawara for Petitioner

Patel for the Company

Kamau holding brief for Maina Wachira for Objector/Creditor

Teresia – Court Clerk