



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

WINDING-UP CAUSE NO. 2 OF 2012

IN THE MATTER OF : PRIORITY DEVELOPMENT LIMITED

AND

IN THE MATTER OF : THE COMPANIES ACT

RULING

1. The Petitioners filed a Winding Up Petition against the Company Priority Development Limited (herein after the Company) on 14th September 2012. The filing of the Petition followed a demand made by the Petitioners as provided under Section 220 of the Companies Act (Cap 486).
2. For consideration in this Ruling is the Notice of Motion dated 20th November 2012 filed by the Company. By that Notice of Motion the Company seeks the striking out of the Petition on one main ground, that the debt is disputed.
3. The Company and the Petitioners had an agreement dated 15th March 2010 whereby the Company offered for 99 years lease to Petitioners an apartment situated on Plot Nos. MN/1/10418/10419/10423/1042. Petitioners paid the required deposit of Kshs. 980,000/-. Petitioners allege that the Company failed to complete the construction of the apartment and has failed to refund the deposit plus the legal fees totaling Kshs. 1,099,500/-.
4. In an affidavit in support of the Notice of Motion the Company, through its Director Shlomi Jerome, it is deponed that as at 7th March 2010 parties were discussing changes which needed to be implemented in the apartment and that, that discussion took a period of time. That the Company suffered a burglary in December 2010 which led to delay in construction. In November 2011 the apartment was ready and Petitioners were requested to make second payment towards the purchase price but failed to do so. That once the Statutory Notice was served on the Company the Company opted to negotiate but what accompanied such negotiation amounted to admission of liability. That Petitioners are using the Winding up procedure in circumstances that constitute abuse of the process of Court. Deponent also referred to a Clause in the agreement and stated that Petitioners should have referred the dispute to an Arbitrator.
5. Learned Counsels for the Company by their written submissions abandoned a ground in the Notice of Motion where the Company wished to object to the Petition on the ground that the Petition is defective and incompetent. Surprisingly however, Learned Counsel raised another ground which was not in the application or in the Company's Replying Affidavit when Counsel submitted that the Petition was advertised before it was served on the Company contrary to Rule 23 of The

Companies (Winding Up) Rules. Since that submission is not supported by any deposition in the affidavit and since it amounts to Counsel adducing evidence from the bar I will not interrogate that submission any further. Learned Counsel relied on the case CRUISAIR -Vs- CMC AVIATION LTD (No2)KLR which was the only case supplied to the Court by the Company's Advocate. In that case decided by Court of Appeal on 11th July 1978 as per Madan J.A had the following discussion-

“Earlier the Judge quoted a passage from the judgment of Ungood – Thomas J in Mann v Goldstein [1968]2 ALL ER 769, 775, of which the following is an extract which I would respectfully adopt:

'... the Winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, unless a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court ... The legitimate purpose of such a process is to wind up a company on a ground specified in the Companies Act 1948 which, so far as material to this case, is the ground that it is unable to pay its debts. Its not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because Section 224 makes it a prerequisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.'

The following passage appears in Buckley on the Companies Acts (11th Edn) pages 356, 357:

'A Winding-up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition presented ostensibly for a Winding-up order but really to exercise pressure will be dismissed and under circumstances may be stigmatised as a scandalous abuse of the process of the Court.'

6. The application was opposed. One of the Petitioners, Florence Kirigo Awimbo denied that there was a dispute as envisaged in the agreement because:
 - u. **the Company failed to adhere to the time line of the completion of the apartment;**
 - u. **due to that unexplained unreasonable delay Petitioners sought a refund of their money;**
 - u. **the Company did not object to that demand since through its Director it informed the Petitioners it was arranging to make the refund;**
 - u. **after this Petition was filed the Company made a written offer to refund the amount paid by monthly instalments of Kshs. 100,000/- per month, which offer was rejected by Petitioners; and**
 - u. **there was therefore no dispute to be referred to an Arbitrator.**

Petitioner finally deponed that the Company being unable to pay its debt was rightly for Winding-up as provided under the Companies Act.

7. Learned Counsel for the Petitioner referred to authorities amongst which was RE GLOBAL TOURS AND TRAVELS LTD [2001]1 EA where the Court stated-

“The alleged debt need not be clearly and unequally admitted by the Company. And a substantial dispute is not merely to be inferred from the affirmation of one party that there is a dispute and an affirmation to the contract by the other party.”

8. The one and only issue for determination is whether the debt the subject of the Petition is disputed.
9. Learned Counsels for Petitioner by their letter dated 15th February 2012 made a demand for

refund of the money paid by the Petitioner giving reason for that demand to be the delayed completion of the construction; the renaming of the apartments and failure of the Company to grant Petitioners a lease as per contract. The Counsel then representing the Company responded thus-

“Your ref:GM/0039/CON My ref: AS/P.9 Date: 20th March 2012

Mucheru-Oyatta & Associates

Advocates

3rd Floor, Capitol Hill Towers,

Cathedral Road,

P.O. Box 7769-00200,

NAIROBI

By Email

Dear Sir,

Re: Sale of Apartment C3 Block C. My clients Priority Development Ltd.

Your clients: Mrs. Florence Ngatia & Mr. David Awimbo

I refer to your letter dated 15th February and 9th March 2012 in this matter.

Please note that my client suffered from a stroke and was hospitalized and hence the delay in responding to your said letters.

Please note that my client has spent the money in building the apartment in accordance with your client's specification and has therefore requested 60 days to enable him to arrange for his financing and refund your clients money.

I await to hear from you.

Yours faithfully,

Anita D. Shah.”

10.The Counsel for the Company further wrote the following letter-

“Your ref: GM/0039/CON My ref: AS/P.9 Date:16th October 2012

Njeri Mucheru-Oyatta

Gadhia & Mucheru Co.

Advocates

3rd Floor, Capitol Hill Towers

Cathedral Road

P.O. Box 7769-00200

NAIROBI

By Email

Dear Sir,

Re: Winding Up Cause HCCC Mombasa My Clients Priority Development Ltd

Your Clients: Mrs. Florence Ngatia & Mr. David Awimbo

I refer to this matter.

Please note that my clients wish to settle this matter by paying your clients monthly installments of Kshs. 100,000/- per month until payment in full. Kindly confirm whether this is agreeable to your clients.

I await to hear from you.

Yours faithfully,

Anita D. Shah.”

11. As has been stated in this Ruling and as per Ringera J (as he then was) in **RE STANDARD LTD, EXPARTE TRICOM PAPER INTERNATIONAL BV (2002)2KLR** the alleged dispute, which could lead to the striking out of a Petition, must be predicated on substantial grounds but cannot be constituted by affirmation of the debt by the Creditor and a denial by the Company. In my examination of the evidence presented by the parties before me I find no substantial ground that would lead me to find that the debt is disputed. It then follows that there is no dispute that can be referred to an Arbitrator. Nor is the statement that parties were in the year 2010 discussing changes to be made in the apartment, or that the company suffered a burglary in December 2010 be a basis. The deposition that the Petitioner's apartment was ready in November 2011 and that it was the Petitioners who failed to pay the balance due is not supported by documents before me. I have seen the email sent by the Company's Director to the Petitioners dated 4th December 2011 where he stated the 3rd and 4th floor of the apartment was completed and therefore requested the Petitioner to pay 35% of the total price. However, Petitioners' Counsel by their letter dated 15th February 2012 stated in part-

“On visiting the site on 13th February 2012, our client (Petitioners) found the structure is yet to be roofed yet your client claims to be carrying out internal finishes.”

That is the letter that elicited the response, reproduced above, of the Company's Counsel where Company undertook to refund Petitioners money in sixty (60) days. There was no denial by the Company in that letter that the apartment was incomplete.

12. I also reject the Company's ground that the Petitioners are not owed interest as demanded in the Statutory Notice. I wholly adopt the finding of the Court in the case **RE RAINBOW MANUFACTURERS LTD (2003)1 EA** thus-

“Where there was no doubt that the Petitioners were creditors for a sum which would otherwise entitle them to a Winding-up order, a dispute as to the precise amount owed was not a sufficient

answer to the Petition (see Re Tweed Garages Limited (1962)ALL ER 121).”

Since the Company does not deny owing the Petitioners some money the difference in the amount owed cannot be the basis of striking out the Petition.

13. Accordingly the Notice of Motion dated 20th November 2012 is dismissed with costs.

It is so ordered.

DATED and DELIVERED at MOMBASA this 6TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE