



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Winding Up Cause 40 of 2011

IN THE MATTER OF RUPA COTTON MILLS (EPZ) LTD

AND

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

RULING

1. Before me is a Notice of Motion application dated 9th May 2012 brought by the Applicant/Company under Section 223 of the Companies Act. The application seeks stay of the orders ruling and orders of this court granted on 15th March 2012 pending the hearing of the Applicant's appeal against the said ruling and orders. The application is founded on grounds set out on the face of the application and is further supported by the affidavit of Prabodh K. Shah, a director of the company, sworn on 9th May 2012.

2. The essence of the application is that the company is aggrieved by the ruling and orders of this court made on 15th March 2012 particularly with regard to permission of the Petitioner to proceed with winding up proceedings against the company. The Company has therefore appealed against the ruling and all orders arising therefrom. However, the temporary stay orders granted on 15th March 2012 are set to expire before the appeal is heard and determined, due to circumstances currently prevailing in the Court of Appeal. Meanwhile, in compliance with the court's directions that parties pursue out of court negotiations, a meeting between the parties and their lawyers had been held on 27th April 2012 and a proposal subsequently made to the Petitioner. That proposal had however not been responded to. In the premises, unless stay is granted, the company's appeal would be rendered nugatory and the company would suffer irreparable loss. To illustrate the imminent loss, the company states that it has invested heavily in the development of the company and had employed over 230 employees. The company is prepared to provide whatever security the court may direct.

3. The application is opposed through a replying affidavit by Sunil Srivastava, the Branch Manager of the Petitioner's Industrial Area Branch sworn on 18th May 2012. The Petitioner's position on the application is as follows:

- 1) The application is defective and incompetent in law and should be struck out, as neither Section 223 (a) nor 223 (b) of the Companies Act permit stay of a ruling or order of the court;
- 2) The Applicant is guilty of inordinate delay in bring in the application for stay;
- 3) No record of appeal has been served upon the Petitioner hence no appeal has been filed;
- 4) The orders of stay sought if granted would encourage the company to blatantly neglect to pay the debt;

5) The Applicant lacks any seriousness to negotiate a settlement with the Petitioner as demonstrated by email communication exchanged between the parties and annexed as “SS1” in the replying affidavit;

6) The Applicant had provided no suitable security; and

7) Allowing stay would occasion the Petitioner the hardship of having to wait for the appeal to be determined whilst its admitted debt remained unpaid.

4. Counsel for both parties filed written submissions to buttress the parties’ respective positions as rendered above.

5. I have carefully considered the application, the affidavits in support of and in opposition to the application and the submissions filed by learned counsel for the parties.

6. The issues I need to determine in this application are two-fold; whether this court has jurisdiction to grant stay of the ruling of this court of 15th March 2012 and the orders issued consequent to the ruling and, secondly, whether the present application by the company merits grant of the stay orders sought.

7. The application before the court is stated to be brought under Section 223 of the Companies Act which provides for stay of suits or proceedings against the company upon the presentation of a winding up petition and before a winding up order has been made. In my reading of the said section, I find it doubtful that an application for stay pending an appeal against a ruling made in a winding up proceeding can be brought under this section. In my view, Section 223 (a) of the Companies Act operates to allow for applications for stay of suits already filed and pending in the High Court or the Court of Appeal by or before the presentation of a winding up petition to be made in the court to which these are pending. Section 223(b) of the Act on its part operates in respect of suits pending in other courts essentially the subordinate courts and allows for applications for stay of those suits to be made to the court having jurisdiction to wind up the company. An application for stay pending appeal within the winding up proceedings themselves does not in the circumstances appear to be provided for under Section 223 of the Companies Act.

8. In my view, the jurisdiction to stay proceedings under the Companies Act is contemplated under Section 251(1) of the Companies Act which provides that the court may grant stay of proceedings either generally or for a limited period of time, upon issuing a winding up order and on such terms and conditions as the court thinks fit. In the present matter, the court is yet to issue a winding up order. Section 251(1) of the Act would therefore not apply.

9. Nevertheless, confronted with applications such as the present, courts have been prepared to find that they have jurisdiction to grant stay, in deserving cases, under the court’s inherent powers. This position was enunciated in ***In the matter of Madhupaper International Limited 2006 eKLR*** where **Lady Justice Kasango** held as follows:

“I am of the view that the Companies Act does not provide the law regulating the conduct of Companies and Rules of procedure. Being so I find that the Civil Procedure Act and Rules do not apply to matters under the Companies Act. Even if the Companies Act did not provide for stay of winding up orders, the court is adequately “clothed” with its inherent power which can be invoked to issue stay”.

10. I am in agreement with the above holding as regards the invocation of the court’s inherent powers in a situation such as the present where the Companies Act does not make an appropriate provision. I however, with deep respect, hold a contrary view as regards the application of the Civil Procedure Act and Rules in winding up proceedings.

11. I have had occasion to address the approach that the courts should take where a procedural lacuna arises in the Companies Act and the Companies (Winding Up) Rules. This was in ***Winding Up Cause No. 1 of 2012 In the Matter of Charlestone Travel Limited (unreported)***. In that matter, I held that

whereas the Companies Act and the Companies (Winding Up) Rules should ideally be a complete code on the procedure and remedies applicable to companies' winding up, that code did not address every eventuality arising in the course of winding up proceedings. Notwithstanding this, neither the Companies Act nor the Rules gave the indication of an intention to completely dethrone the application of normal civil procedure to winding up proceedings. This is because a saving for such application was expressly set out in the Companies (Winding Up) Rules in Rule 203, as follows:

“In all proceedings in or before the court, or any judge, registrar or officer thereof, or over which the court has jurisdiction under the Act or these Rules, where no other provision is made by the Act or these Rules, the practice, procedure and regulations in such proceedings shall, unless the court otherwise directs, be in accordance with the rules and practice of the court”.

12. I therefore made the finding that where the Companies Act and Companies (Winding Up) Rules did not specifically provide for the procedure that a party must adopt in approaching the court for certain reliefs within the ambit of winding up proceedings, a residual window for application of normal civil procedure was imputed and in fact contemplated. I found this conclusion to be in tandem with the holding in the case of **Uganda General Trading Co. Limited V. N.T. Patel [1965] E.A. P. 149** where an objection was made by counsel for the defendant based on the ground that the court did not have jurisdiction to try an action that could not be regarded as “proceedings in the winding up of a company”. In his judgment, **Sir. Udo Udoma, C.J.** (as he then was) held as follows:

“I do not think the objection is well founded. It is unsound. It cannot be doubted that this court is not only competent but that it has jurisdiction to try this case. The court is vested with full jurisdiction to try all cases concerning companies, whether such companies are in liquidation or not or whether such cases are originated by suit, summons or motion”.

13. Similarly, in **Pennington’s Company Law, 7th Edition, 1995, Butterworths, London, Dublin and Edinburgh** the authors addressed the same issue in the following manner:

“if the court is satisfied that a petition is well founded... the court may make such order as it thinks fit to give relief in respect of the matters complained of, and so may fashion the remedy to suit the circumstances of the particular case. The court’s jurisdiction is therefore equitable in character although originating in a statutory provision; this is because the concept of unfairly prejudicial conduct towards the petitioner is akin to the equity notions of oppression, unfair and inequitable conduct and taking improper advantage of the petitioner’s vulnerability”.

14. In the result, I hold that while the application before the court invokes the wrong provision of the Companies Act, this court has jurisdiction to consider the application for stay of proceedings pending appeal not only under its inherent powers as held in the **Madhupaper case (supra)** but also under the residual application of normal practice and procedure of the court.

15. Turning to the merits of the application, the principles that a court faced with an application for stay should apply were enunciated in the case of **Kenya Shell Limited vs. Kibiru & Another [1986] KLR 410**. In that decision, **Hancox JA** (as he then was) held as follows at pg. 414:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause”.

16. The above position was informed by the holding of **Megarry J.** as he then was in the case of **Erinford Properties vs. Cheshire County Council [1974] 2 All ER 448** where he held as follows:

“A judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision, recognize that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to

preserve the status quo pending the appeal”.

17. The above criteria constrains me to recognize that while I fully believe that the ruling I gave on 15th March 2012 was sound and meritorious, and while the decision was substantively in favour of the Petitioner, that decision may as well be reversed on appeal. With this possibility comes a peremptory obligation to ensure that the intended appeal would not be rendered nugatory.

18. Following from the above, I am minded that the right of a party to appeal against the decision of one court to a higher court is well entrenched in Kenya’s Constitution and in the country’s legal and court system. A court from whose decision an appeal is preferred should ordinarily not act as to fetter the exercise of this right unless just cause is shown. A judge is not infallible and even where the judge is convinced that the conclusions reached in a decision were well vindicated by law and facts, that conviction should not blind the judge into subverting a challenge to the decision at the appellate court. Undeniably, the development of jurisprudence portends that decisions of the High Court should be open to judicial interrogation and scrutiny at the appellate courts for enrichment and consistency.

19. Cognizant of the foregoing, the thrust of the application dated 9th May 2012 is that the Applicant is dissatisfied with the orders that this court made on 15th March 2012. Those orders effectively gave liberty to the Petitioner to proceed with the winding up process, save for a 60-day window which the court granted in its discretion to allow parties explore possible out of court settlement. Upon expiry of the said window, the Petitioner was at liberty to advertise the Petition. The application before me therefore seeks to obviate such action pending an appeal from the decision.

20. To demonstrate its intention to appeal against the ruling of this court of 15th March 2012 aforesaid, the Applicant filed a Notice of Appeal on 22nd March 2012 which it states was timeous. However, the Applicant is yet to file its record of appeal owing to the time it takes for a party to obtain certified copies of the ruling, typed proceedings and extracted orders for purposes of compiling the record.

21. From the Notice of Appeal, I note that the Applicant intends to appeal against the whole decision of this court made on 15th March 2012.

22. I am unable to determine at this stage whether the intended appeal is arguable as no record of appeal has been filed. I do not however think that this limitation should defeat the application before me *in limine*.

23. In support of its present application, the Applicant claims that it has assets of over Kshs. 1,094,182,165/-, employs over 230 employees and is a feasible and viable on-going concern. It also claims that there is an existing civil suit in respect of the same debt being HCCC NO. 526 of 2011 and which it states that the Petitioner failed to disclose to this court. The Applicant therefore strongly feels that unless the orders of stay are granted, the company’s appeal would not only be rendered nugatory but the company would stand to suffer substantial loss and irreparable damage. The Company is also willing to provide security.

24. In reply, the Petitioner states that the Applicant has brought the application with undue delay, no record of appeal has been filed and that the intended appeal is indeed now deemed as withdrawn for failure to comply with Rule 83 of the Court of Appeal Rules. Stay of the winding up proceedings would therefore cause a grave injustice to the Petitioner, as it would encourage the Applicant to remain in neglect of its loan repayment obligations.

25. The Court of Appeal guided that in the court’s exercise of its inherent powers in granting stay, the overriding objective to do justice to all the parties must be observed. This was underscored in the case of ***Harit Shett T/a Harit Sheth Advocate Vs Shamas Charania***[2010] eKLR (Civil Application No 68 of 2008) as follows:

“We have also taken into account the provisions of Section 1A and 1B of the Civil Procedure Act and

section 3A and 3B of the Appellate Jurisdiction Act, which provisions came into force on 23rd July, 2009. By these new concepts of jurisprudence the courts, including this court, in interpreting the Civil Procedure Act or the Appellate Jurisdiction Act or in exercising any power must take into consideration the overriding objective as defined include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

26. I have agonized over the above two strong positions by either side in my quest to place the parties on equal footing.

27. On the one hand, it is lucid to me that a winding up order before the intended appeal is heard would completely render the appeal nugatory as it would, as a fundamental consequence, completely paralyze the company's ability to even prosecute the appeal. This court's refusal to grant stay in essence would translate into pre-emptive impediment to the company's constitutional right of appeal, which we have already discussed above. The advertisement of the winding up petition itself would open up the company to the vagaries of creditors, scare away suppliers and wholly immobilize its operations. The totality of this is that the company would find it difficult to continue as a going concern. The company has demonstrated sufficient cause that the appeal would not only be rendered nugatory but that it would suffer irreparable and substantial loss should stay be refused.

28. On the other hand, the Petitioner itself, being an unsecured creditor, is not assured that the debt owing by the company would be capable of recovery in such conditions. It is also apparent that the secured creditors of the company would upon advertisement of the winding up petition move to crystallize their debentures effectively precluding unsecured creditors including the Petitioner from pursuing repayment of their debts. Not to mention that the Petitioner has already instituted a civil suit pursuing the same debt and which is pending before this court. That suit is still amenable to prosecution until final determination. In the end, it may as well not be in the interest of the Petitioner to have the company wound up just as yet.

29. On the question of furnishing of security, winding up proceedings, unlike money decrees do not provide a predictable outcome in terms of debt recovery. This places me in an awkward position as regards what quantum of security to impose. I would therefore hesitate to venture further in this regard.

30. In the result, and bitter as the Petitioner is bound to feel about the natural delay that the stay orders would occasion to its recovery efforts, the balancing act I am required to inculcate tilts in favour of grant of the stay orders sought in the present application. Such orders find rest in the reasons set out above and are to me in the larger interests of justice, not only for the Applicant but also for the Petitioner, the secured creditors and other stakeholders.

31. Meanwhile, the Petitioner should be at liberty invoke the Court of Appeal jurisdiction to procure expedient prosecution and determination of the appeal or to indeed seek to otherwise dispose of the appeal as the options under that jurisdiction may provide.

32. For all the above reasons, the order that commends itself to me is that the Applicant's Notice of Motion 9th May 2012 is hereby allowed with no orders as to costs.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 12TH DAY OF JULY 2012

J. M. MUTAVA

JUDGE