



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Winding Up Cause 7 of 2008**

**IN THE MATTER OF AL'AMIN INSURANCE BROKERS LTD.**

**AND**

**IN THE MATTER OF THE COMPANIES ACT**

**RULING**

The petitioner, Invesco Assurance Co. Ltd (*under statutory management*) presented this petition seeking to wind up Al'Amin Insurance Brokers Ltd (*hereinafter referred to as the company*) on the ground that the company, being indebted to the petitioner in the sum of Kshs.6,862,024.15, had failed to pay the same despite the petitioner issuing several requests and the statutory demand under Section 220 of the Companies Act. The petitioner averred that the company was in the circumstances insolvent and therefore unable to pay its debts and it would be just and equitable that the company be wound up. Although the petitioner did not set out the section of the Companies Act that it was predicating its petition to wind up the company, it was obvious that the petitioner based its petition on Section 219(e) and (f) of the Companies Act which provides that a company may be wound up if it is unable to pay its debts.

When the company was served with the petition, it filed a notice of motion pursuant to the provisions of Rules 5(2), 7(i), 23, 31, 202 & 203 of the Companies Winding Up Rules, Rule 3 of the Companies (High Court) Rules, Sections 221(i), (iii), 222 (1) and 344 of the Companies Act seeking several orders from the court. The company sought orders to restrain the petitioner by means of an injunction from publishing the gazette of the petition or from re-advertising or notifying any other person or institution of the winding up cause or calling or requesting any other party to join in the said winding up proceedings whether in support or in opposition of the same or in anyway prosecuting the petition before the hearing and determination of the application. The company further prayed that the hearing of the petition herein be stayed pending the hearing and determination of the present application. Finally, the company sought orders of the court to strike out the petition with costs. The grounds in support of the motion are set out in the face of the application and is supported by the annexed affidavit of Bhai O. Alamin. She swore an affidavit in further support of the company's application. The application is opposed. Geoffrey Njenga, the statutory manager of the petitioner swore two affidavits in reply and opposition to the application.

Before the hearing of the application, the company's and the petitioner's advocates agreed by consent to file written submissions in support of their respective clients' cases. On the date scheduled for the hearing of the application, I heard oral rival submissions made by Mr.King'ara for the company and by Mr. Watta for the petitioner. The said counsel filed lists of authorities which they relied on in their submissions. I must confess that the research undertaken by the said counsel have been of invaluable assistance to this court in reaching its determination. I would be ungrateful if I did not acknowledge the

industry and effort that the said counsel put in their research in their bid to persuade this court to reach a determination that is favourable to their respective clients. Having carefully considered the said rival arguments, the issue for determination by this court is whether the company established a case to restrain the petitioner by means of an injunction from proceeding with this petition and further stay proceedings herein. Another issue for determination is whether the company established just cause for the court to strike out the petition. In essence, the company is seeking to stay the winding up proceedings or strike it out on essentially the ground that the petitioner did not have just cause to file the petition since the amount demanded was disputed.

The parties to this application are more or less agreed on the principles to be considered by this court in determining whether or not to grant the orders sought by the company. They both relied on a citation in Vol. 7 (3) of the Halsbury's Laws of England, 4<sup>th</sup> Edition, 2004 reissue at paragraph 452 which states as follows:

*“A winding up order may not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on a substantial ground. A dispute as to the precise amount due is not a sufficient answer to the petition. If there is a genuine dispute, the petition may be dismissed or stayed, and an injunction may be granted restraining the advertisement or publicizing of the petition. Where a petition has not been presented but is threatened in respect of a disputed debt, an injunction may be granted restraining the presentation. If the debt is not genuinely disputed on some substantial ground, the court may decide this question on the petition, but it will usually dismiss a petition grounded on a disputed debt and leave the dispute to be decided in an action (or claim). The court may order the amount of the alleged debt to be paid into court. Where the judgment for the debt on which the petition is presented is reversed before the hearing, the petition may be dismissed. It is an abuse of the process for a petition to be presented on the basis of an unascertained debt which has never been demanded and for which no opportunity to repay has been given.”*

In Re a company (No 008725 of 1991 and No 008727 of 1991) [1992] BCLC 633 it was held that for an application to restrain a winding up petition to be successful, it had to be established that the debt was disputed in good faith and on substantial ground. It would not suffice for the company to argue that an investigation is yet to be undertaken that may produce grounds on which the debt can be disputed. Onyango Otieno J (as he was then) In the matter of Bentley Travel Ltd Nairobi HC W.C No.5 of 1999 (unreported) cited with approval the English decision of In Re The London Wharfing and Ware Housing co. Ltd (1865) 35 Beau 808 at page 809 where Sir John Romilly M.R. said:

*“I am of the opinion that the petitioner has no case at all, and that when there is simply a disputed debt it is not a legitimate object to present a petition to wind up a company...But if a company is able to pay the fact of its disputing a debt or of not paying it is no justification for a creditor to come by petition to wind it up.”*

In Mann vs Goldstein [1968] 1WLR 1091 at page 1095 Ungood-Thomas J held that:

*“I come now to the allegation of lack of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, even though with personal hostility or even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide but acting bona fide in accordance with the process. And certainly no authority suggesting otherwise has been brought to my attention. In In re Welsh Brick Industries, Lord Greene M.R. treated a bona fide claim as being a claim based on some substantial ground when he referred to “considering whether or not the dispute is a bona fide dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action.” And, so far as is material here, the winding up process provides that the petition shall be presented by a creditor and that the winding up order shall be on the ground that the company is unable to pay its debts.”*

The above decision was cited with approval by Bosire J (as he was then) in the winding up case of In Re Crescent Construction Co. Ltd Nairobi HC W.C. No.38 of 1993 (unreported) and by Shah\_JA in CA Civil

Appeal No. 191 of 1995 Lilian Njeri Mungai vs Dr. Njoroge Mungai (unreported).

It appears that, at least in Kenya, that the circumstances under which winding up petition may be filed has been circumscribed. For instance, in Re Bentley Travel Ltd (supra) Onyango Otieno J (*as he was then*) held that a winding up petition ought not be preferred in the case where the petitioner has a remedy in filing a claim in court against the company for such alleged debt. He was of the opinion that the winding up provisions of the Companies Act should not be used to blackmail companies through threat of preferring winding up proceedings every time a company disagrees with a would be creditor or every time a company denies indebtedness. In Re Lucton Kenya Ltd Nairobi HC W.C No.20 of 1997 (unreported) Aganyanya J (*as he was then*) held that where the company has made proposals to liquidate the outstanding amount by installments, it would not be sufficient ground for the creditor to allege that such proposal was proof that the company was unable to pay its debts. In Re Mugoya Construction & Engineering Co. Ltd Nairobi HC W.C No.30 of 2004 (unreported) Azangalala J held that for a petitioner to have *locus standi* to file a petition to wind up a company on the ground of its inability to pay a debt, conclusive proof must be presented to the court that the debt owed to the petitioner by the company was undisputed and further that the company has been unable to pay the said undisputed amount. In Re Gilani Butchery Ltd [2004] eKLR Ibrahim J cited with approval the decision of Kekewich J in New Travelers Chambers Ltd vs Cleese & Green (1874) 70LT 271 at page 272:

*“Of course the question whether this is a debtor or not may possibly be tried by a Winding Up petition, but it has been said over and over again that the presentation of a Winding Up petition is not a convenient and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt – if the question is not a mere question of quantum, but whether there is in fact a debt or not – a petition ought not to be presented and therefore the court ought to restrain the presentation of the petition.”*

In Matic General Contractors Ltd vs Kenya Power and Lightning Co. Ltd [2001] LLR 3493 the Court of Appeal held as follows in regard to an application similar to the present one seeking to restrain the advertisement of the petition and staying of proceedings upon it:

*“In the case of In Re a Company [1894] 2 Ch 349, it was held that where a petition against a company is presented ostensibly for a winding up order, but really for another purpose, such as putting pressure on a company, the court has an inherent jurisdiction to prevent such an abuse of process, and will do so, without requiring an action to be commenced, by restraining the advertisement of the petition, and staying all proceedings upon it. I have no doubt in my mind that the Learned Judge was right in placing emphasis on the appellant’s motives, which in my view, were completely dishonourable. A winding up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim that seems to me to require that the court, should proceed cautiously. Here was a debt which Kenya Power disputed vigorously on substantial grounds and the appellant was threatening Kenya Power with what really amounted to imminent corporate execution. Kenya power had no alternative but to approach the court for redress having regard to the appellant’s intransigence.”*

It is therefore evident that in general, the court will restrain winding up proceedings where it is established that the debt is bona fide disputed or where the court is of the opinion that the debt that the amount that forms the basis of the winding up proceedings is actually due.

In the present application, it was apparent that whereas the petitioner insists that the debt of Kshs.6,862,024.15 owed by the company is undisputed, the company on the other hand is of the view that such a debt is not owing and is subject to accounts being taken to determine the actual amount owed. I have perused the documents annexed by the parties to this winding up cause in support of their respective opposing positions. What emerges from the said documents is that the petitioner and the company had a running business relationship by which the petitioner allowed the company to maintain a running account with it. The sums that the company paid to the petitioner were paid on account. There were not paid in respect of specific transactions. The issue of the outstanding amount has always been niggling point of disagreement between the petitioner and the company before the petitioner was placed under statutory

management. From correspondence exchanged between the petitioner and the company, it was apparent that the parties herein had more or less agreed to the mode in which the dispute relating to the outstanding account would be amicably resolved or settled. That was before the statutory manager came into the scene and reversed what had tentatively been agreed upon.

The statutory manager reverted to the original position that the company still owed it the amount that is the subject of this winding up cause. Now, can it be said that the amount demanded by the petitioner is undisputed? I do not think so. It is evident that the company is bona fide in its insistence that the negotiations that had taken place between the company and the petitioner before it was put under statutory management ought to be put into account in determining the amount that is actually due and owing to the petitioner. The company has raised a substantial ground that the amount demanded by the petitioner is genuinely disputed since accounts will have to be taken and reconciled done to determine what is actually owed, if at all. That is not a task that the law has assigned to this court in winding up proceedings. That is the duty of the court that will determine the rights of parties herein in a suit which ought to be filed for the dispute to be resolved.

I therefore hold that the company has established a substantial ground which constitutes sufficient reason for restraining the petitioner by means of an injunction from publishing the gazettelement of this petition and from re-advertising or notifying any other person or institution or in calling or requesting any other party to join this winding up proceeding in any media, whether electronic or print. It is evident from this court's ruling, that the dispute between the petitioner and the company can only be resolved in a suit where the petitioner will be required to prove its claim against the company. This court in its winding up jurisdiction, cannot, and indeed is ill equipped to determine whether the amount demanded by the petitioner is actually owed or not. I will therefore grant prayer 4 of the application and strike out the petition herein with costs to the company.

It is so ordered.

DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF JULY 2009

**L. KIMARU**

**JUDGE**