



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

(MILIMANI COMMERCIAL COURTS)

Winding Up Cause 9 of 2008

IN THE MATTER OF THE COMPANIES ACT, CAP 486

AND

IN THE MATTER OF WINDING UP FIRST LOTTO LIMITED

RULING

This is a petition presented by Fidelity Commercial Bank Ltd (*hereinafter referred to as the petitioner*), a creditor, seeking to wind up First Lotto Ltd (*hereinafter referred to as the company*) on the grounds that the company had failed to pay to the petitioner the sum of Kshs.3,620,930.12, a sum that is legitimately owed, dispute being served with the requisite statutory notice. The petitioner averred that the said sum, together with an additional interest of 25% per annum constitute the amount advanced to the company by the petitioner, at the petitioner's own request, in respect of hire purchase and overdraft facilities. It was the petitioner's case that to date the company has failed to pay the said outstanding amount hence the present petition to wind up the company. The petitioner prayed that the cost of the petition be provided out of the assets of the company on priority basis. The petition is supported by an affidavit sworn by Phillip Muoka, the legal officer of the petitioner. The company's chief operations officer, Zahir Rayani swore a replying affidavit in opposition to the petition.

Prior to the hearing of the winding up cause, the parties agreed by consent that the hearing of the winding up cause be disposed off by the parties filing written submissions which will subsequently be highlighted orally before the court. At the hearing of the petition therefore, I heard brief oral arguments made by Mr. Kanjama for the petitioner and by Mr. Khan for the respondent. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions, both oral and written. The issue for determination by this court is whether the petitioner established to the required standard of proof on a balance of probabilities that it is indeed owed the said sum of KShs.3,620,930.12 and which cannot be disputed by the company on substantial grounds. The principles to be considered by this court in determining whether or not to grant the prayers sought by the applicant are more or less settled. In **Halsbury's Laws of England, 4th Edition, Vol. 7 (3) 2004** reissue at paragraph 452 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.

It would appear that, at least in Kenya, the circumstances under which winding up petitions may be filed has been circumscribed. For instance, in the matter of **Re Bentley Travel Ltd Nairobi HC W.C No.5 of 1999 (unreported)** Onyango Otieno J (*as he was then*) held that a winding up petition ought not be preferred in a 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 the present petition, certain facts appear not to be in dispute. It is not disputed that the company operated an overdraft account with the defendant which by the time the petition was filed had been overdrawn by the sum of KShs.1,036,106.12. The company further took an asset finance with the petitioner with a view to enabling it purchase a motor vehicle for its business. The company executed a hire purchase agreement with the petitioner. The company defaulted in repaying back the agreed monthly installment resulting in the petitioner repossessing the said motor vehicle. The same was sold by the petitioner. According to the petitioner, the amount that remains outstanding together with the accrued interest at the time the petition was filed was KShs.2,584,824/=. Both the overdraft and the hire purchase account continue to attract interest at the rate of 25% per annum. It is the petitioner's case that it issued a valid statutory notice pursuant to **Section 220(a)** of the **Companies Act** requiring the company to pay the same within a period of three (3) weeks or in default thereof the bank would petition the court to wind up the company. The company did not pay up the amount demanded hence the present proceedings.

The company challenged the petition on essentially five grounds: (i) that the debt is bona fide disputed on substantial grounds by the company. It was the company's case that there were discrepancies in some entries made in the overdraft account that requires investigation (ii) that the petitioner had acted beyond its mandate as a banker when it caused a cheque of KShs.500,000/= payable to the Betting Control & Licencing Board to be diverted to unauthorized account (iii) that the petitioner ought to render account to the company for the proceeds of the motor vehicle that was sold after being repossessed from the company (iv) that the petitioner was abusing the process of the court by filing the present petition with a view to pressurizing the company to pay a debt that was bona fide disputed. It was the company's view that the petitioner ought to have filed an ordinary suit to enforce its alleged claim against the company (v) and finally, that the hire purchase agreement that the petitioner seeks to hold the company liable was incompetent on account of the fact that the same was not registered in accordance with the provisions of the **Hire Purchase Act**.

In response to the grounds put forward by the company in objection to its winding up, it was the petitioner's case that in fact the company had not established its solvency or its ability to pay the debt.

The petitioner argued that the company was technically insolvent because it was relying on long term borrowing to finance its operations. It was further the petitioner's case that the company had failed to establish to the required standard of proof that it had disputed the amount demanded by the petitioner on substantial grounds. It was therefore the petitioner's case that the company ought to be wound up under **Section 219 (e)** of the **Companies Act** on account of its inability to pay its debts.

Having evaluated the rival arguments of the parties herein, I find that the petitioner has established a case for the winding up of the company. The petitioner proved to the required standard of proof on a balance of probabilities that it made an offer to the company (*an offer which was accepted*) by which the company would overdraw its account to meet its working capital. From the bank's statements annexed to the affidavit of Phillip Muoka in support of the petition, it was evident that the company overdrew the said account and failed to put funds in the said account in accordance with the loan agreement between itself and the bank. Although there appears to have been change of management of the company, the current chief operating officer of the company Zakir Rayani, admitted in his letter dated 26th June 2007 that the company owed the overdraft amount save for the fact that he requested the petitioner to re-consider the rate of interest applied to the said account. Similarly, on 9th July 2007 the said officer admitted that the company was bound to pay the amounts due in respect of the hire purchase agreement for the motor vehicle. In light of this express admission of the debt, the company cannot say that the grounds it has put forward in opposition to the petition constitutes substantial grounds upon which this court can exercise its discretion and dismiss the petition.

It was further evident that some of the grounds which the company relied on to challenge the winding up petition are based on misapprehension of the law. For instance, it was the company's case that the court ought to invalidate the hire purchase agreement by reason that the same was not registered in accordance with the requirement of **Section 5(1)** of the **Hire Purchase Act**. The company further argued that the said agreement was invalid on account of the fact that it had not been stamped in accordance with the provisions of the **Stamp Duty Act**. The company would have been on sound footing in its argument if it was a legal person other than a body corporate. **Section 3(1)** of the **Hire Purchase Act** specifically excludes the application of the **Hire Purchase Act** on hire purchase agreements where the hirer is a body corporate. The company cannot therefore rely on the **Hire Purchase Act** to support its contention in regard to the alleged illegality of the hire purchase agreement between itself and the petitioner. It was further evident that if the company was aggrieved by what it considered to be abuse of mandate by the petitioner in regard to payment of the alleged sum of KShs.500,000/= to third party other than the payee, it had the option to file suit in court for appropriate remedy. In the circumstances of this cause, this court did not see the connection between a debt which has been admitted by the company as owing and another completely different transaction which has no nexus whatsoever with the two financial transactions that are the subject of this winding up cause.

The upshot of the above reasons is that I allow the petition filed herein. I direct that the company be wound up on account of its inability to pay its debts pursuant to **Section 219 (e)** of the **Companies Act**. I direct the petitioner to appoint a liquidator for the purpose of winding up the company. The liquidator shall exercise powers under **Section 241** of the **Companies Act** and shall make a report to the court in respect of the winding up of the company within three (3) months of today's date. The petitioner shall be paid the costs of this petition from the assets of the company on priority.

It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2009.

L. KIMARU

JUDGE

