



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Winding Up Cause 40 of 1998**

**In The Matter of Autorec Spares Ltd and In The Matter of Companies Act**

**Ruling.**

This is an application for injunction. It seeks to stop the prosecution of the petition and its striking out for being frivolous, vexatious, an abuse of the court process and meant to embarrass the company. The petition is instituted with malafides and brought to exert pressure on the company to pay an amount that is disputed. The company is not insolvent and will suffer irreparable loss and damage if the petition is advertised.

The petition is based on a demand for payment of some US\$ 84,709.32 which is a result of a transaction between the company and the petitioner to supply the company with spares of Indian origin as shown in the import declaration form. The demand letter was replied to pointing out that the goods supplied were not those ordered and are of no use of to the company. The use of winding up procedure for purposes of disputed debts is not permitted in law.

The petitioner disputes that the goods in question are not of Indian origin. On that basis, the company opened 4 IDFS confirming that the goods were per specification. The company's letter in reply to the demand letter was fully replied to by the petitioner and there has not been any acknowledgement bringing out any dispute. The company has never refused or has rejected the delivery of the goods. It has not to date returned the goods in question. The petitioner agrees that this is not a debt collection but money actually due and the company had the option if it is disputed the indebtedness, to file a declaration suit saying that the debt was disputed and not liable.

In argument counsel submitted that the company has not sold any of the goods. The documents filed on behalf of the petitioner in response to the application have not shown any admission of liability on behalf of the company. Invoices alone do not prove any indebtedness. It is the law that proceedings on a petition presented with an illegitimate object of putting pressure on the company would be stayed as an abuse of process. The observations of Harman L.J in Re LHF Wools Ltd that if there was a cross claim like in this case damages for breach of contract, is just as if there were disputed debt.

It is contended by the petitioner that the application be struck out as a sham and abuses the court process. As the goods were supplied in 1996 to 1997, the company does not show liability has ever been disputed. In the application and affidavit, they do not show they are prepared to return the goods. There is an inspection report of 1996 which shows no dispute as to the goods as the goods were accepted on September 25, 1996 goods examined and inspected and found to be of Indian origin. The period the company took to complain is too long.

The petitioner complains that the company has deliberately concealed the letter of July 22, 1998 from the petitioner in which the petitioner stated that the company had awaited for too long to raise spurious defences. They were informed the goods were inspected at source by their representative during the representative's visit to Bombay. Additionally SGS inspected the same goods.

Needless to say the letter of July 22, 1998 has not been replied to to date. I think there is no question of a genuine cross claim therefore, for breach of agreement. Accordingly as the debt itself is in my view not disputed, taking into account all the circumstances, say inspection by the company representative before

shipment and by SGS, together with the long time it took for the company to complain and finally the fact that these goods have not been returned, the company has not made out a prima facie case upon which an injunction may be granted. What is more is the fact that the petition is properly founded on a non disputed debt which has not been paid by the company to the petitioner.

In view of all the foregoing the application fails and is dismissed with costs.

February 8,1999

Keiwua, J