REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 20 of 1997

In The Matter of Lucton Kenya Ltd and In The Matter of Companies Act

Ruling.

This application is made by chamber summons under order XXXIX rules 1, 2 and 9 of the Civil Procedure Rules.

It was filed in court on 1st September 1997 seeking an order of injunction to restrain the petitioner. Its servants or agents or any of them or otherwise however from advertising or causing to be advertised the petition herein in any or all of the local daily newspapers and / or the Kenya Gazette or otherwise howsoever.

It was supported by an affidavit deponed to by one Amrik Sighu Rihal a director of the applicant.

In this affidavit, Mr Rihal deponed that on 5th February 1997 the respondent had set to the applicant a demand notice for payment of Kshs 1,241,746.75 in respect of goods sold and delivered. However, the deponent had been advised by his counsel that this was not a valid notice under section 220 of the Companies Act, Chapter 486 Laws of Kenya

e the petition was not begin brought to court properly.

According to the deponent there are real ad serious issues which if the applicant was not allowed to file would not be adjudicated probably result in injustice to the applicant, hence the court should grant the orders sought in the chamber summons.

Then the applicant had disputed the amount claimed by the respondent from as for back as November 1996 and that though the latter was aware of the dispute, it had nevertheless maliciously filed the petition in an attempt to improperly pressurize the former to pay an otherwise disputed amount.

The deponent stated further that negotiations on a without prejudice basis had been entered into between January and June 1997 by counsel or both parties to reconcile the disputed accounts and that the applicant had proposed to amicably settle the matters in dispute and indicated its ability, willingness and intention to pay any outstanding amounts subject to resolving the issue of discounts and excessive interest which was never agreed on by the applicant but which the respondent had continued to charge.

That the applicant has an active trading concern capable of repaying its creditors including the respondent.

That the respondent had acted malafide by unreasonably rejecting applicants offer to settle the dispute

amicably, and that the petition he filed in order to defeat the ends of justice hence the application to an injunction.

There was a replying affidavit filed by the respondent and deponed to by one David J Rogers, its Managing Director.

In this affidavit the Managing Director deponed that the applicant justly and truly owed the respondent a sum of Kshs 1,241,746/75 plus agreed interest at 2 ½% per month.

That the existence of the alleged dispute in relation to the amount claimed was not aground or sufficient around for the applicant to oppose the petition for winding up.

That there was no dispute as to the assistance of the debt as the applicant had offered to pay through various advocates, by instalments.

That the respondent had no other motive rather that to recover its money from the applicant and that it was not aware of the existence of any dispute over the amount claimed.

Mr Rogers disputed the existence of the letter marked ASR 2 ad said this letter was sorted to a wrong address and / or that this was a fake ad bogus letter.

That in any case, this letter was not disputing the applicants indebtedness to the respondent but it was marely complaining or referring to the respondents complaints that the applicant was selling the farmer's respondents at below costs and hence putting its separation of a good quality paint manufacturer at stake.

That the applicant had been purchasing the respondents paints and selling it at under costs and pocketing the proceeds of such sales while neglecting to pay the latter and that its belated attempts or create a dispute was a ---------- to deprive the respondent of its rightful dues hence the application in an injunction is a total abuse of the court process.

That a dispute as to the precise amount owed is not a sufficient answer to the petition nor is it aground or prevent the respondent from advertising or proceeding further with the petition.

That the solvency or otherwise of the applicant is immaterial on the question of paying its debts and their since it had nor paid its debts, it was only just and equitable that it be wound-up.

Counsels appeared in court on 11th September, 1997 to ---------- the application counsel to the applicant stated that it, the said applicant, was a trading concern capable of paying its debts to the ----------, including the respondent.

That the petition to wind-up the company was filed maliciously and that it should be stopped hence this application injunction.

That I the order of injunction is not made the advertisement of the petition will damage the business of the applicant thus causing it irreparable loss.

Counsel submitted further that the applicant had disputed the claim being made and was willing to settle what was justly due from it.

That there were malafides on the part of the respondent to pressurize and intimidate the applicant.

That a ---------- offer was made by the applicant to the respondent who unreasonably rejected it.

That the onus that the applicant was unable to meet its obligations is on the respondent which the latter had not satisfied – hence the application.

Counsel to the respondent submitted that the application was an abuse of the process of the court, that the applicant had not come to court with clean hands and that it had not given an undertaking as to damages.

That though a notice had been given to the payment of the debt, no payment had been made nor was there a compounding of the debt.

Counsel submitted further that the court cannot impose a condition whom the respondent or that the respondent should accept payment of the debt by instalments.

According to him, the issue at stake was whether applicant is in a position to pay its debt when ordered to do so.

Counsel disputed the letter said to have been sent to the respondent disputing the amount demanded saying this letter was never sent to and / or received by the said respondent.

He submitted that there was no denial on the part of the applicant that the supplied of paint were made and that though some offers were made by the applicant to the respondent, (In payment by instalment) the later was not obliged to accept such offers; that an offer to pay by instalments is in itself a sign of inability to pay the debt.

As far as counsel is concerned, when a demand is made and the company – applicant cannot pay on the spot then it is unable to pay its debts.

That a dispute should be based on a substantial bonafide ground like when either no money is owing to the petitioner at the time of demand or that there is a counterclaim which exceeds the petitioner's claim.

Counsel submitted that the ---------- demanded is not material and particularly here where it is not in dispute. That since the respondent has established the existence of a debt, and the applicant shown its inability to pay ---------- it is only fair and prudent that it be wound up.

These are arguments advanced for and against this application for an injunction to restrain the respondent from advertising or causing the advertisement of the petition to be made or published with a view to having the applicant to be wound-up.

Section 219 of the Companies Act Chapter 486 Laws of Kenya gives the circumstances under which a company can be wound up, one of which is inability to pay its debts – sub section 219 (d).

Section 220 of the Act defines inability to pay debts thus:-

(a) If a creditor, by assignment or otherwise to whom the company is indebted in a sum exceeding one thousand shillings then due has saved on the company, by leaving it at the registered office of the Company, a demand under his hand, requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

According to counsel for the respondent once a demand to payment of the debt is made act such payment is not received within a given time, then the debtor was shown its inability to pay the debt.

In the case subject to this application, the respondent had supplied the applicant with paint to sale on credit over a period of time.

The unpaid amount rose to Kshs 1,241,746/75 and on 25th February 1997 the respondent demanded payment of this amount from the applicant within 3 days. No payment was made.

There then followed an exchange of correspondence on the matter between the parties which did not yield any fruitful result because the applicant made certain proposals to resolve the matter amicably. The

proposals included payment of the outstanding amount by instalment.

The respondent rejected these proposals all said in the letter dated 13th June 1997 that nothing short of full payment and counsels fees on solicitor – client basis was agreeable.

As a result of the disagreement the respondent instituted winding-up proceedings now subject to the present suit and/or application.

Inspite of some authorities cited during the submissions on this application, the nagging ------- here is whether the applicant can be said to be unable to pay his debts just because he has offered to make the payment by instalments. Counsel to the respondent seems to think so.

In my view in a commercial set up payment of a debt by instalments is one of the settled modes of settlement of debts. Much as some parties would wish to urge for a full payment, may cases are settle trough instalment payment.

Where, therefore, as in this case one party offers to pay a debt by instalment, it is not plausible to deduce that he/she it is unable to settle its debts.

In fact in the description of "inability to pay debts, there is provision to securing or compounding to it to the reasonable satisfaction of the creditor.

To compound is described in a simple concise Oxford Dictionary as including settling a debt by partial payment.

In two letters sent by the applicants counsel to the respondents counsel, the former proposed to settle the debt by instalments of Kshs 75,000/= and 100,000/= per month.

The respondents counsel did not intimate that these offers were inadequate and / o r make a counter offer for consideration by the applicants. Instead both offers were rejected outright all the respondent insisted on full payment.

In the court counsel says in submissions that it cannot be compelled to accept payment by instalments. But it is what business is all about. One cannot remain so rigid and insist that full payment must be made or else such and such consequences will be offered, as in this case where the respondent insists that if full payment is not made then winding-up proceedings will be put into effect/

This is too suppressive if not intimidating.

On the other had, the applicant is indebted to the respondent in a big sum of money by any standards. A sum of Ksh 1,241,746/75 is not small.

For the applicant to show good faith and a willingness to settle it, instead of making more proposals, it should at least have put down a deposit to slow that it was really ready to make payment, in view of the fact that it had received the commodities from the respondent and indeed sold them.

It is most probable that in the circumstances of this case it was not sufficient to the applicant to make a more proposal to pay the money by instalments without making a down payment to show its serious committee. Maybe the respondent could not believe the more word from the former.

But from the submissions made and the documents perused I cannot say there is a real dispute as to the precise amount owed. If this were so, the applicant would have pointed this out in the various correspondence exchanged with the respondent.

Nowhere in the letters dared 25th May 1997, 9th and 25th June, 1997 addressed by the applicant to the respondent did this issue arise.

But having, heard and considered the submissions advanced by counsel to both parties and also perused the correspondence exhibited, I am of the view that the applicant should have been given a chance to show that he was able or otherwise to pay the subject to this dispute even if it settle it by monthly instalments.

Otherwise as it stands now, the respondent has not convinced me that the applicant is unable to pay its debts.

On the other hand I am satisfied if this injunction is not granted, the winding up proceedings will be instituted with the result that the applicant will lose its business and if at the end of the day the case succeeds, such result will be redoned nugatory as it would be difficult to reconstitute such business with the resultant irreparable loss.

The balance of c---------- in this case tends to tilt in favour of the applicant who would very much have wished to continue in business.

However, in this particular case it would not be just to start an injunction without ----- ad would issue one to restrain the respondent its ---------- or agents or any of them from advertising or causing to be advertised the intended petition in any all of the daily local newspapers and / or the Kenya Gazette on condition that Kshs 500,000/= is deposited in court within 30 days from the date hereof and that the case be mentioned on 10th November 1997 in further orders.

If this condition is not complied with, this application to --------- disused and the Petition to be advertised and / or published as intended and winding-up proceedings to commence. Costs of the application to he respondent.

Order accordingly.

October 7, 1997

Aganyanya, J