IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Cockar & Muli JJ A)

CIVIL APPEAL NO 107 OF 1990

Between

INTONA RANCH LTD.....APPELLANT

AND

JOSEPH THOMAS O'BRIEN.....RESPONDENT

(Appeal from an Order of the High Court of Kenya at Nairobi (Mr Jusctice Tanui) dated the 2nd day of November, 1989

in

Winding Up Cause No 9 of 1989)

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JUDGMENT

This appeal is from the order of the superior court (Tanui J) dated the 2nd November, 1989 in Winding Up Cause No 9 of 1989 directing that Intona Ranch Company (the Company) be wound-up under the provisions of the Companies Act cap 488 Laws of Kenya and appointing the official receiver to be the provisional liquidator of the Company.

The Company was incorporated in Kenya with nominal capital of Kshs 20,000/- divided into 1000 shares of Kshs 20 each. The petitioner is Mr Joseph Thomas O'Brien while Mr Steve Omenge Mainda was said to be one of the Directors of the Company. The petitioner presented the petition dated the 2nd March, 1989 stating that the Company was the principal debtor of Trade Bank Ltd (the bank) and as such it was obliged to indemnify him as the guarantor and surety to the extent of the sum he placed in a fixed deposit with the bank together with accrued interest and which deposit was appropriate by the bank to liquidate the outstanding overdraft. The petitioner prayed in the petition for the winding-up of the Company for having been unable to meet its debt to the extent of the guaranteed debt. The learned trial Judge granted the order and appointed the official receiver to be the provisional liquidator of the Company.

The Company appealed to this Court. Mr Kivuitu who appeared for the appellant Company advanced 9 grounds in the Memorandum of Appeal complaining that the learned trial Judge erred in finding the Company to be insolvent when it was in a position to pay the admitted part of the alleged debt and was prevented from doing so by the respondent; that the Judge failed to inquire fully into the conflicting issues in the pleadings to satisfy himself that the winding-up order was necessary and expedient; that he failed to

inquire fully and confined himself to the appellant's opposition which he said was not *bona fide*; that the Judge failed to consider the respondent's stance that he must be paid in full what he claimed which fact made it impossible for the appellant to remit the admitted part of the debt; that the Judge made the winding-up order and thereby deprived the appellant the right to prove its claim related to the respondent's investment of capital with a view to realizing profit, and finally that the admitted claim was unknown and was taken without the authority of the appellant Company. In effect these complaints can be telescoped into one main ground, namely was the appellant Company insolvent and unable to meet its debts to justify its being wound-up by the Court?

These complaints will become meaningful after we recapitulate briefly the facts of the dispute. The facts as they emerge from the petition and the affidavits are that the main object of the Company was to carry on the business of farming and agricultural activities and to do other trades, or business whatsoever which can , in the opinion of the Board of Directors, be advantageously carried on by the Company in connection with and auxiliary to the general business of the Company.

In order to carry out its objects, the Company opened a bank account with the Trade Bank Ltd and sought overdraft facilities for one year in the sum of Kshs 800,000.00. As the bank required a satisfactory guarantor and surety, the petitioner, at the request of Steve Omenge Mainda on behalf of the Company, became the guarantor and surety of the overdraft and offered diverse securities to the bank including a cash fixed deposit with a letter granting the bank a *lien* over the deposit. In 1986 and 1987 the Company utilized the overdraft facilities towards the working capital and general running expenses of the Company.

The Company did not pay the overdraft at the end of the one year with the result that the bank demanded payment. By their letter dated 10th June, 1988 the Credit Manager of the bank wrote to the petitioner quantifying the Company's indebtedness to the bank and demanded payment of Kshs 939,209.70 inclusive of interest. The letter went on:

> "In accordance with the Trade Bank Ltd general terms and conditions which you signed at the time you were opening the account, and other securities which we hold, we hereby demand that full payment of the outstanding... be effected by the close of business (3.30 pm) on Thursday June 17th 1988.
>
> If the above outstanding plus accrued interest and any expenses incurred by Trade Bank Ltd as a result of pursuit of the present claim have not been fully paid to us …we will, at your expense, initiate appropriate actions under securities currently held by Trade Bank to achieve full recovery of the outstanding debt owed by yourself to Trade Bank Ltd."

No payment was received by the bank on or before the stipulated date and in July, 1988 the bank exercised its right of *lien* over the sum placed by the petitioner in the fixed deposit.

The petitioner, being mindful of the loss of the large sum of money he had placed on the fixed deposit as the guarantor of the Company, demanded by way of subrogation indemnity by the Company in the sum of Ksh 870,000.00 being the Company's guaranteed debt and accrued interest. We shall henceforth refer to this indebtedness as "the Company's guaranteed debt".

The petitioner had another claim as outlined in paragraph 8 of the petition amounting to Kshs 730,000.00 for the purchase of about 500 head of steers; a further sum of Kshs 15,000/- to supplement the said purchase and a further Kshs 20,000.00 to pay wages for the Company staff making a total of Kshs 765,000.00. The petitioner states that the sums were loaned to the Company at the oral request of Mr Steve Omenge Mainda, as the Director of the Company. There are acknowledgment letters of the sum of Kshs 730,000/- for the purchase of approximately 500 head of steers for fattening for sale in mid 1986 and Kshs 15,000/- provided to supplement the said purchase of the 500 steers for fattening on the Company ranch to be repaid on sale of the steers with shared profit. The first acknowledgment is dated 8th January, 1986 and is as follows:-

> "8th January, 1986.

Intona Ranch Ltd

Purchase of Steers

We acknowledge receipt of Ksh 730,000/- (Seven Hundred and Thirty Thousand Shillings) for the purchase of approximately 500 head of steers for fattening on the above for sale in 1986.

Yours faithfully,

W G T O'Brien

Received in full …

Date 8/2/86."

The second acknowledgment is dated 29th April, 1986 and is as follows-

"Intona Ltd: Loan Shs 15,000/=

This loan is provided to supplement that of 8th January, 1986 to purchase 500 steers for the purpose of fattening on Intona Ranch, to be repaid on sale of steers with shared profits.

Agreed for and on behalf of Intona Ltd

Sgd

Mr Mwashimba

Nairobi

29th April, 1986."

In his affidavit dated 16th May, 1989 in reply to the petition, Mr Steve Omenga Mainda, repudiated this loan for the purchase of the steers as being the loan to the Company deponing that the loan arose under a business agreement between the petitioner and himself personally for the purchase of 500 head of steers for fattening on the Intona Ranch and then to be sold and the profits from the sale to be shared equally. This debt was thus not admitted as a company debt. He deponed further that the loan was a "venture capital" for the purchase of 500 steers for fattening on Intona Ranch and then for sale and share of profits equally. In the event of loss, the petitioner would share the loss equally with him (Mainda). We shall henceforth refer to this debt as "the steers purchase debt". There followed exchanges of correspondence between the petitioner and Mr Mainda or their advocates and finally the petitioner issued the following notice to the Company:

"J T O'Brien

PO Box 48449

Nairobi

22nd August, 1988

Intona Ranch Lmited

Registered Office

Plot No Transmara Intona / 2 PO

Kilgoris via Kisii

Recorded Delivery

Dear Sir

I, J T O'Brien:

(a) being the guarantor to Trade Bank Limited for overdraft facilities of Shs 800,000.00 granted by such bank to Intona Ranch Limited do hereby demand by way of indemnity at common law on the principle of money had and received and in the sum of Shs 870,000.00 paid by me to Trade Bank Limited under my guarantee dated 9th November, 1987.

(b) being a lender to your Company of Shs 765,000.00 for the purchase of cattle and payment of staff salaries do hereby demand Shs 765,000.00 loaned by me to you at the request of your Director Mr Steve Omenge Mainda on the principle of money had and received.

Please accept this as formal notice under section 220 of the Companies Act that unless the said sums are paid to me within 21 days from the date of service of this letter, I shall instruct my advocates Inamdar & Inamdar to file a winding up petition in the High Court to wind up your Company.

Yours faithfully,

J T O'Brien

1. Mr Omenge

2. The Company Secretary

Intona Ranch Limited

Garden Chambers

Moktar Daddah Street

Nairobi."

We observe here that the demand notice calls for payment of both the Company's guaranteed debt as well as the steers purchase debt.

This notice was not complied with, with the result that the petitioner presented the petition to the Superior Court for the winding-up of the Company as being unable to pay the Company's guaranteed debt to the petitioner as its guarantor and surety to the bank. The petitioner prayed that it is just and equitable that the Company be wound up by the Court under the Companies Act and such other order as shall be just.

Section 220 of the Companies Act is as follows:-

"A company shall be deemed to be unable to pay its debts-

(a) if a creditor, by assignment or otherwise to whom the Company is indebted in a sum exceeding one thousand shillings then due has served 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, or

(b) not applicable, or

(c) if it is proved to the satisfaction of the Court that the Company is unable to pay its debts, and in determining whether the Company is unable to pay its debts the Court shall take into account the contingent and prospective liabilities of the Company".

There is no dispute that the petitioner stepped into the shoes of the bank as soon as the bank appropriated the fixed cash deposit to liquidate the guaranteed overdraft.

As we have already observed, there are two debts shown on this notice (*supra*), namely the 'Company's guaranteed debt' which was admitted and the 'steers purchase debt' which was not admitted as the debt due from the Company. According to Steve Omenge Mainda, it was a "Venture Capital" under a separate agreement between himself and the petitioner for the purchase, fatten and sale of the steers and to share the profits equally.

The petition came for hearing before different Judges of the Superior Court and finally before Tunoi J. The evidence before the learned trial Judge was by way of affidavits and documents. After very brief submissions by Mr Sandhu for the respondent and Mr Onyimbo for the Company the learned Judge made the following order –

"Having heard the submissions of the advocates and having perused the affidavits documents authorities I am satisfied that the petitioner is entitled to the orders he seeks in this petition. The Company has not shown that the debt is disputed on *bona fide* grounds. The Company has not discharged its onus on this. It is therefore ordered that Intona Ranch Ltd is wound up under the provisions of the Companies Act and the official receiver is constituted provisional liquidator of the affairs of the Company. The costs of the petition to be taxed and paid out of the assets of the Company."

In his grounds of appeal in the Memorandum of Appeal, Mr Kivuitu complained that the appellant Company was not insolvent as it was in a position to pay the Company's guaranteed debt but the respondent refused to accept the payment. The bank had informed the respondent on 10th June 1988 that the debt due was Kshs 939,209.70 as at that date and demanded payment to be made on or before 17th June, 1988 at 3.30 pm. There being no payment from the Company, the bank then liquidated the overdraft by the fixed cash deposit which the respondent had placed with the bank as security for repayment of the overdraft. On 22nd August, 1988, the respondent gave the Company the notice under section 220 of the Companies Act to pay the sums demanded in the notice within 21 days.

The notice was in fact demanding "the Company guaranteed debt" which was admitted as well as "the steers purchase debt" which was disputed. On 2nd September, 1988, Mr Steve Omenge Mainda wrote to the respondent on behalf of the Company as follows:

"I would like to assure you that the payment of the amount guaranteed could be paid in two equal instalments on or before 31st December, 1988. The rest of the amount could equally be recovered from the sale of the cattle now ready at the farm. All that is required is for you to indicate your willingness to resolve this matter amicably. I am totally flexible, largely on the basis of gentleman's agreement between the two of us. I would have hoped and expected that if for no other reason, this flexibility of ours would at least have earned us that right to meet and resolve the issues instead of me receiving threatening/demanding notices from your advocates and yourself".

There being no solution or payment by the Company the advocates for the parties met and the advocates for Mr Mainda wrote on 15th May, 1989 to the advocates for the respondent offering settlement as follows:-

"We are now pleased to inform you that in view of various arrangements our client, Mr Steve Omenge Mainda is about to make as regards the proposed sale of his property known as Nairobi/Block 3734/755, Tende Drive Lavington we would hope to be able, within the next seven

> days to confirm our undertaking to pay you on account of Intona Ranch Ltd, the sum of Ksh 824,737/20 on or before 31st Augutst, 1989 in full and final settlement of this matter …. As regards the balance of Kshs 745,000/- claimed by your client, we are informed by Mr Omenge that he disputes this on grounds that a large number of cattle died due to disease, some cattle have not yet been sold etc. Once this issue has been resolved, we will hopefully receive further instructions from Mr Omenge to pay the additional agreed amount, if any." (underlining is mine)

All this was confirmed by Mr Omenge by signing the letter personally in addition to his advocate's signature. This was long after the demand notice under section 220 of the Company's Act had been served on 22nd August, 1988. The offer to pay the "Company guranteed debt" was evidenced by the sale agreement of Mr Omenge's property in Nairobi with specific special conditions as to how to disburse the proceeds of the sale on completion of the sale agreement. One of the special conditions was to pay the sum of Kshs 824,734/20 to the respondent's advocate for the credit of the account of the Company in the matter of Mr J T O'Brien in Bankruptcy & Winding Up Cause No 9 of 1989.

Special conditions of the sale agreement were as follows:

> "M/s Francis Da Gama Rose & Co are instructed by the vendor that upon successful completion of this transaction, the said advocates should dispose of the sale proceeds in the manner following:-
>
> (a) Make full payment to Kenya Re-insurance Corporation the chargee of this property of all monies due to them,
>
> (b) M/s Inamdar, Advocates, Nairobi the sum of Kshs 824,734/20 (Eight hundred twenty four thousand seven hundred thirty four and cents twenty only) for credit to the account of Intona Ranch Ltd in the matter of Mr J T O'Brien in Bankruptcy and Winding Up Cause No 9 of 1989.
>
> (c) The balance in accordance with the vendor's further written instructions to Ms Francis Da Gama Rose & Co."

The Company's admitted debt does not correspond with the sum demanded in the statutory notice (*supra*).

The admission of the Company's indebtedness to the bank and to the petitioner was in the sum of Kshs 824,734/20 and not Ksh 870,000/- as demanded in the notice. There was the offer to liquidate Ksh 824,734/20 on or before the 31st August, 1989 from the proceeds of the sale of property Nairobi/Block 3734/755- Tende Drive, Lavington, Nairobi. The offer for payment was specifically rejected. At the date of the petition (2.5.89) the respondent had demand two specific debts, the 'Company's guaranteed debt' which was partially admitted and the 'steers purchase debt' which was disputed. Although there was no evidence of the fate of the sale of the property, clearly there was a genuine offer which was rejected by the respondent. There was no evidence of the insolvency of the Company. There was no evidence to show that the Company was unable to pay it's debt because there was a genuine offer which was rejected by the respondent. Additionally the admitted part of the 'Company's guaranteed debt' was included in the same demand notice which claimed the disputed 'steers purchase debt'. With such dispute then the notice under section 220 of the Act became disputed, in so far as the Company's guaranteed debt was concerned and certainly incorrect as far as the steers purchase debt was concerned.

The rejection of the admitted part of the 'Company's guaranteed debt' by the respondent frustrated possible payment of any of the alleged debt. The demand of the disputed steers purchase debt in one demand notice was a triable issue and to that extent that part of the alleged steers purchase debt was not due. The entire debt become equivocal and the Court was duty bound under section 220 of the Companies Act, firstly, to ascertain whether the demanded debts (Company's guarateed debt and the steers purchase debt) were due and secondly whether the Company had neglected to pay or to secure or compound for it (s 220 (a)) and thirdly whether there was proof to the satisfaction of the Court that the Company was unable to pay its debts (s 220 (c)).

With greatest respect the learned trial Judge misdirected himself on the evidence before him. Right from the start, the Company's guaranteed debt was partially admitted and an offer for the settlement of the admitted portion was made but rejected by the respondent. The steers purchase debt was disputed from the start on the ground that the alleged debt was a capital investment by both the respondent and Mr Omenge personally under a separate agreement to purchase 500 steers for fattening and sale with a view to making a profit to be shared equally. Thus it was disputed as a debt due from the Company. Mr Kivuitu urged us to hold that both the debts, having been demanded in one notice under section 220 of the Act, the entire lot was rendered to be in dispute once the respondent rejected the offer for the settlement of the admitted portion of the Company guranteed debt. In effect he submitted that the entire debt was not due until proof of the steers purchase debt was established. The finding by the learned Judge that the Company "has not shown that the debt was not in dispute" was not supported by the evidence. That there was the dispute of the steers purchase debt was clearly on the record. The Company guaranteed debt was not admitted fully. The result was that both alleged debts were in dispute and none was due.

The onus to show that the debt was due was on the respondent. Similarly the onus to prove that the Company was unable to meet its debts was on the respondent. The respondent did not discharge this onus of proof as required under section 220 of the Act.

It is settled law that the winding up order is not automatic. There must be proof of insolvency and/or inability on the part of the Company to pay its debts.

In *Re The London Wharfing and Ware Houseing Co Ltd* (1865) 35 BEAV 808, 809 Sir John Romilly MR 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… There was strong evidence of its being in a state of financial difficulty, the debt was disputed, and if it had been admitted to be due, the Company was not then in a situation to pay it…… 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 the instant case a part of the debt was disputed and the admitted part was rejected. There was no proof that the entire debt was due or that the Company was insolvent or that it was unable to meet at least the admitted part of the debt. At least no evidence was adduced to establish the contingent and prospective liabilities of the Company as required under section 220(c) of the Act.

In *Re London and Paris Banking Corporation* (1875) LR 19 Equity Cases p 444 Sir G Jessel M R at p 448 had this to say following *London Wharfing Warehousing Co (supra)*

> "Although there may have been a difference or apparent difference of opinion between the Lords Justices Knight, Bruce and Turner, I believe the courts below have invariably acted on what I understand was the opinion of Lord Justice Knight Bruce; and I should be bound by authority (even if I entertain a different opinion, which I do not) to hold that if the debt is *bona fide* contested, and there is no evidence other than non –compliance with the statutory notice to show that the Company is insolvent and the Company denies insolvency, - I ought to dismiss the petition. I must say, however, that the facts of the case go far beyond what I have stated, and are such as to convince me that this petition has not been presented *bona fide* – that is, not with the view of obtaining a winding up order, but with the object of extorting from the Company a larger sum than they thought was fairly due, under pressure of a threat to present the winding up petition."

This Court follows these persuasive authorities. The Company having disputed the debt(s) cited in the statutory notice but offered to pay the admitted portion, then the respondent was not entitled to present the petition. To do so was tantamount to exerting pressure on the Company to pay what was due and offered as well as the disputed portion. Petition for a winding up order of a company should never be presented as a means of exerting pressure to pay even an admitted debt where there is no evidence of insolvency and

inability to meet the debt. The facts of this case indicate clearly that presentation of the petition without proof of the disputed debt to be due and inability of the Company to meet its admitted debt was to exert pressure on the Company as a means of recovery of what was duly offered and rejected as well as what was disputed and not due. (See *Re: Bellador Silk Ltd* [1965] 1 All ER p 667, 672) Ground 1 of the Memorandum of Appeal was the substantive ground and it succeeds. The other grounds of appeal are in substance supplementary to ground one and have been dealt with within the context of the substantial grounds.

Mr Sandhu in his submissions more less adopted what he submitted at the superior court maintaining that the Company was insolvent and unable to meet its debts. We have found otherwise on evaluation of the evidence on record. A substantial portion of the debt was disputed and therefore not due without proof. The admitted part of the debt was offered and rejected. There was no proof of the Company's inability to pay and no proof of contingent and prospective liabilities of the Company to establish that it was insolvent.

In the result we allow the appeal set aside the order imposed by the superior court and direct that the cause be remitted to the superior court for retrial before another Judge. The appellant Company shall have the costs of this appeal.

Those are the orders of the Court.

Dated and delivered at Nairobi this 1st day of December , 1992

J.M GACHUHI

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JUDGE OF APPEAL

A.M COCKAR

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JUDGE OF APPEAL

M.G MULI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR