



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
WINDING UP CAUSE 43 OF 1988
IN THE MATTER OF TRIO HOLDINGS LTD
AND
IN THE MATTER OF MAGNUM INTERNATIONAL LTD
RULING.

This petition was filed by Trio Holdings Ltd (hereinafter called the Creditor) on 19th October, 1988 seeking that Magnum International Ltd a limited liability company registered in Kenya under the Companies Act (Cap 486) and hereinafter called the debtor be wound up on the ground that it is unable to pay its debts and in the circumstances it is just and equitable that it should be wound up.

On 31st January, 1989 Senior Deputy Registrar of this Court certified that the Creditor had duly complied with the Rules under the Companies Act and directed that the Petition could be set down for hearing.

There are three other creditors of the debtor who support this petition. On 10th January, 1989, Justus Kavunda Kalinga a director of the debtor filed his affidavit in opposition to the petition alleging that the debt subject matter of the petition was in dispute and that no notice under Section 220 of the said Act can be issued in case the debt is disputed.

On 14th March, 1989, Mr A.A.K. Esmail for the Creditor filed his affidavit stating that on 25th February, 1988, the creditor, sued the debtor in High Court Case No 696 of 1988 for possession of premises known as L.R. 37/142 occupied by the debtor as the creditor tenant and that the Creditor also claimed a sum of shs 940,000/- against the debtor in that suit as arrears of rent.

On 14th December, 1988 this Court ordered on a summary judgment application as follows:

- (a) the debtor must give vacant possession of the said premises to the creditor on the 31st March, 1989;
- (b) it shall pay to the creditor mesne profits of shs 30000/- per month commencing from 1st October, 1988 until vacant possession is given;
- (c) it shall pay to the creditor a sum of shs 555,900/- as the amount admitted by the debtor as payable by it to the creditor together with interest thereon at the Court rate;
- (d) the debtor is given leave to defend the rest of the creditors claim namely shs 430,000/-

Mr Esmail has also deponed that on 23rd December, 1988, the debtor applied to this Court for stay of execution of the said decree and on 10th January, 1989 the Court granted a stay of execution in respect of the order for possession of the suit premises only and that to on the condition that the debtor would provide within 30 days of the date of the said order a guarantee in the sum of shs 1,410,000/- from a bank acceptable to the Creditor.

He has said on oath that no stay was ever granted in respect of the rest of the decree for payment of arrears of rent and mesne profits. No payment at all either in respect of the said arrears of rent or the mesne profits as ordered by the Court has been made. Subsequently apart from the amount decreed, a further sum of shs 270,000/- has accrued on account of mesne profits from 1/10/1988 to 31/5/1989 which again has not been paid.

The said Justus Kalinga filed a further affidavit on 15th March, 1989 in which he has stated for the first time that the debtor had appealed against the said decree to the Court of Appeal and the said appeal is still pending. He has not attached the Memorandum of appeal in that appeal. Nor has he attached any other evidence to show that the appeal had been filed and it is still pending. However, Mr Esmail has conceded that the debtor had filed an appeal but it is only against the order for possession and not against the money decree. This statement from Mr Esmail has not been disputed either by the debtor or by its advocate. I therefore believe Mr Esmail that the said appeal is not in respect of the debt but is against the order for possession only.

The other point raised by Justus Kalinga in his further affidavits that this petition cannot be determined until the final determination of the said appeal. However, as the debtor has not denied that it had admitted the creditors debt to the extent of shs 555900/- and that the pending appeal is only against the order for possession of the said premises; I cannot see any force in that point.

In his first affidavit Mr Kalinga had also stated that the execution of the decree had been stayed but he has not produced certified copy of the said order of stay. He has produced an uncertified copy of a professed order which according to Mr Esmail had not been approved by him and was never signed by the Registrar. In any event from the said document produced on behalf of the debtor it appears that the order for stay was conditional upon the debtor providing the above mentioned guarantee within the stipulated time and the debtor failed to provide the said guarantee as ordered by the Court. I therefore hold that there is no order for stay of execution of the aforesaid decree certainly none in respect of the execution of the decree in respect of the orders other than the order for vacant possession of the suit premises which does not concern the present petition.

It has been denied on behalf of the debtor that on 11th August, 1988, the creditor served on the debtor a demand requiring it to pay the said sum of shs 940,000/- In that demand the attention of the debtor was drawn to the provisions of Section 220 of the Companies Act. The debtor was notified that in case it failed to pay the amount or to secure or compound for it to the satisfaction of the creditor within 3 weeks of the said demand, it shall be deemed to be unable to pay its debts and the creditors would be entitled to petition for its winding up. It is also not denied that the debtor has not complied with the said demand. Nor has it paid the said lesser sum of shs 555900/- which had been admitted by it.

In the circumstances, I hold that it has been proved to my satisfaction that the debtor company is unable to pay its debts and in my opinion it is just and equitable that it should be wound up. Accordingly I order that the debtor company known as Magnum International Limited be wound up. Costs of this petition are awarded to the petitioning creditor as well as to the supporting creditors.

Daeted and Delivered at Nairobi this 26th day of June , 1989

PALL

Ag JUDGE