

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
WINDING UP CAUSE 40 OF 1986

IN THE MATTER OF RWINO INVESTMENTS LTD

AND

IN THE MATTER OF THE COMPANIES ACT (CAP

JUDGMENT.

This is a petition for the winding-up by the Court of Rwino Investments Company (hereinafter referred to as “the company”). The petition has been presented by Standard Chartered Acceptances Limited (hereinafter referred to as “the Petitioner”) and is supported by 9th other creditors amongst whom one, Shirjibhai & Sons, is a judgment creditor.

The ground on which the petition has been brought is that the company is unable to pay its debts (see sections 219 and 220 of the Companies Act). There is evidence (oral and affidavit) to show that as at 1st August, 1986 the company was indebted to the Petitioner, for moneys lent and advanced, in the sum of shs 946,615/70 and that on 22nd September, 1986 the necessary statutory notice under section 220(a) of the Companies Act was duly served upon the company requiring it to pay the debt within 21 days, which, said notice, elapsed without the company paying or satisfying the said debt.

The company has opposed the petition on the ground that the alleged debt on which the petition is based is disputed by the company and the basis of the dispute is said to be that the Petitioner has filed and / or neglected to supply, regularly, statements of accounts to the company and, consequently the company is unable to verify the correctness and authenticity the company is unable to verify the correctness and authenticity of the alleged sum. Those are the claims contained in the affidavit sworn on 28th July, 1987 by John Joseph Kinyanjui, a director and major shareholder of the company.

Having carefully looked at the claims by the company, I have no doubt in my mind that they all have no substance and accordingly I have no hesitation in rejecting them for the following reasons.

Firstly the company has been, according to the evidence in the Affidavit sworn by Kimani Muthiora on 13th February, 1987, the petitioner’s customer for a long time (a bout 9 years prior to the petition) and throughout that period up to the time of service of the statutory notice, no complaint was raised by the company as to the correctness of the accounts.

Secondly under sections 176 and 177 of the Evidence Act, the statements of the company’s account with the Petitioner (which is a bank within the meaning of section 3(1) of the Evidence Act) annexed to the affidavit of Kimani Muthiora are prima facie evidence of the matters therein recorded. Since therefore, there was no evidence (apart from the mere allegations contained in Mr Kinyanjui’s affidavit) to show that the entries in the statements were wrong, I am justified in accepting the entries in the statements as correct notwithstanding the company’s claim to the contrary. In any event, no evidence has been adduced by the company to substantiate the general allegations (they are no more than that) contained in Mr Kinyanjui’s affidavit.

“The Court will not dismiss a petition merely because the company alleged that it has a defence to the creditors claim, unless it also shows that the defence is likely to succeed in point of law, and adduces at

least prima facie proof of the facts on which the defence depends. The fact that the company disputes the amount of the debt claimed by the petitioning creditor will not induce the court to dismiss the petition if the company admits that it is indebted to him for an amount which, taken by itself, would be sufficient for making a winding up order.” See Penningtons Company Law – Fourth Edition – Page 679

The debt owed to the Petitioner and to the nine other creditors is an excess of shs 2,687,126/=. No evidence has been adduced to show that the company is in a position to pay or satisfy it. To all intents and purposes the company is insolvent. That this is so was borne out by the company’s readiness as disclosed by its counsel at the beginning of the proceedings, to concede to the making of the winding-up order, on conditions which this court however found unacceptable. There is therefore no doubt in my mind that the company is unable to pay its debts and the Petitioner is entitled to have a winding-up order as prayed in the Petition.

Accordingly it is ordered that the company be wound up and the official receiver be appointed the provisional liquidator. The costs for the Petitioner and those of the supporting / will be paid out of the / creditors company assets.

As regards the costs of the company I am satisfied that the company unnecessarily resited this application, and consequently, I order that the company’s costs shall not be paid out of the assets of the company until all the unsecured creditors have been paid in full. Orders accordingly.

Dated and delivered at Nairobi this 11th day of February 11, 1988.

MBALUTO

JUDGE.