



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

Winding Up Cause 16 of 1986

In The Matter of New Continental Hotel (1976) Ltd and In The Matter of the Companies Act (Cap 486)

Judgment.

This a petition filed by Demetrous Koulouris (the petitioner) the executor of the estate of late John Couloris, seeking orders (inter alia) that New Continental (1976) Limited (the company) be wound up by court under the provisions of the companies Act, Cap 486 Laws of Kenya

company opposes the petition on the grounds specified in the affidavit of Mr Silas N Chege filed out of time, but with leave of court on 30th September, 1986.

No other creditor or any other party has appeared either to support or oppose the petition.

Mr Da Gama Rose appearing for the petitioner with Mr Mohamed has stated that the only issue is “whether the company can ask this court not to exercise its discretion and grant the petition because it has instituted other proceedings against the petitioner putting forward a claim for damages.”

It is not disputed by the company that it is indebted to the petitioner in the sum of Shs 618,720/- for rent due by the company to the petitioner in terms as agreed in the Business Premises Rent Tribunal on 18th November, 1983 particulars whereof were set out in a document marked Ex 1 annexed to the orders made by the said Tribunal on that day. Indeed it is not possible for the company to challenge the debt unless it has paid the same. The debt has not been paid.

Mr Omondi for the company says that it is misstatement to state that the petitioner is a decree-holder in B.P.R.T. case No 19 of 1983, that being the reference in the Tribunal in which the orders recorded in DK 1 annexed to Mr Koulouris’ affidavit sworn on 1st October, 1986 were made.

Mr Da Gama Rose was at pains to point out that the orders of the Tribunal resulted into a consent judgment or orders.

There can be no doubt that orders of the Business Premises Rent Tribunal result into a judgment capable of being executed by the Resident Magistrate’s court. I cannot accept Mr Omondi’s submission that if an order of the B.P.R.T. if executed becomes a spent force. Insofar as the order remains unexecuted it still remain an order capable of execution by other means or even by same means if proper execution procedure is followed.

However, for the purposes of this winding-u petition that issue is only an academic one. No doubt a sum of Shs 618,700/- is due by the company to the petitioner.

The real issue here is whether the company’s claim against the petitioner in H.C.C.C. No 686 of 1984 is a

cross-claim of sufficiently arguable nature so as to enable this court (exercising its winding-up jurisdiction) to say that the company has set up a dispute to the debt it owes to the petitioner.

H.C.C.C. No 686 of 1984 was filed by the company against the petitioner on 29th February, 1984, some two and half years before this petition was filed. I am informed from the Bar that H.C.C.C. 686 of 1984 is scheduled for hearing early in November this year. I am also informed that issues in that have been settled which of course must be the case if the suit is set down for hearing.

Mr Da Gama Rose addressed me at length on the ‘demerits’ of the claim in H.C.C.C. No 686 of 1984. I keep in mind the fact that I am not here to decide on whether or not the claim in H.C.C.C. 686 of 1984 is tenable. Suffice it to say it has reached the stage of hearing. This court can hardly be the forum for deciding the merits or ‘demerits’ of H.C.C.C.C 686 of 1984. I can say only this: that suit having reached the stage for full hearing there are issues there which fall for determination by the trial judge; the issues are (1) is the plaintiff company claiming properly through Mr Chege (2) is the plaintiff company entitled to a refund of Shs 500,000/- paid by it (by itself or through Mr Chege being a matter for the trial court) to the def (petitioner here) (3) is the plaintiff entitled to refund of moneys spent by it, if spent, towards costs of improvements (if affected) carried out by the plaintiff in anticipation of purchasing the property (4) Is the plaintiff company entitled other damages in the sum of Shs 800,000/-. Mr Omondi argues that confining his client’s claim for the purposes of this petition to Shs 900,000/- only the cross-claim exceeds Shs 618,720/-. Mr Da Gama Rose asks me to conclude that the claim in H.C.C.C. 618 of 1984 is untenable and therefore grant his prayers.

I note the following salient facts: (1) That the notice under section 220 of the Companies Act was given on 31st May, 1984. (2) That H.C.C.C. 686 of 1984 was filed on 29.2.86. (3) That this petition was filed on 9th May, 1986. (4) That H.C.C.C. 686 of 1986 is fixed for hearing in early November, 1986. (5) That I am not able to say that there are no triable issues in H.C.C.C. 686 of 1986. I cannot say there are no such issues. (6) That a sum of Shs 618,720/- is due by the company to the petitioner. (7) That at no time the petitioner (defendant in H.C.C.C. No 686 of 1984) moved the court to strike out the plaint.

I do not for one moment doubt the correctness of the law as stated in the passages cited by Mr Da Gama Rose (Halsbury’s 4th edition paragraph 1003), also note 6 on page 599, also what Goulding J says in Holt Southey Limited vs Catnick Components Limited (1978) 2 All E.R. P. 276, Empire Digest (Blue Band) volume 10 page 869 – Para 5719. In my opinion the facts relating to the bringing up of winding – up petition here are nearly akin to those in Civil Appeal No 31 of 1977 Crusair Limited vs C.M.C. Aviation Limited with the exception that the suit filed by the company against the petitioner in that matter came uncomfortably close to the filing of winding up petition. The Court of Appeal stated that there was nothing wrong with that. I am, see what Madan J.A. (as he then was) said at page 8 of his judgment. I will set out here: he said:

“Speaking for myself, I cannot see any suspicious features about the timing of the civil action, on that it was filed with rapidity. As I have already pointed out it was filed about six weeks before the presentation of the winding-up petition, not immediately after it.”

That civil action here was, I have already pointed out, filed some two and half years prior to the presentation of this winding-up petition.

I would also respectfully adopt the passage from the judgment of Ungoed-Thomas J.’s judgment in Mann and another vs Goldstein & another (1968) 2 All E.R. 775 which passage was adopted as correct statement of law by Madan J.A (as he then was) in C.A No 31 of 1977. I need not set it out here in extensor.

I would also with approval adopt the passage relied upon by Madan J.A (as he then was) in Buckley on the Companies Acts 11th edition pp 356, 357.

“A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona

fide disputed by the company. A petition preserved ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court.”

I wonder why the petitioner did not take any action to recover what is undoubtedly due to him by the company. I must consider why this petition is presented when H.C.C.C. 686 of 1984 is about to come up for hearing. It is not difficult to imagine that if the company were to be ordered to be wound up now there will be no one effectively left to prosecute H.C.C.C. 686 of 1984. That suit will then probably go unprosecuted. No court in its equity jurisdiction can allow such a thing to happen.

Both sides accuse each other of using the process of court in an abusive manner. The petitioner says that the civil suit was filed with a view to thwart the petitioner from obtaining fruits of judgment in the Business Premises Rent Tribunal case. The company says that this petition was filed with a view to thwarting the company from prosecuting its suit. I note that the petitioner did not attempt to execute the judgment of the tribunal. I do not know why. I have not been told why. I also note that there is no counterclaim made by the petitioner in the civil action. Again I do not know why. Again I have not been told why. No reason has been given why it took the petitioner two and half years to present this winding-up petition.

I can only surmise in the circumstances. It may be that the petitioner does not want the civil suit prosecuted. The reason for this may be that it is costly to defend such a large claim. The petitioner probably thought fit to take this short-cut. But all this is relevant for present purposes.

My above remarks stem from the anxiety the court has when it is dealing with a winding-up petition. It is not an ordinary matter to wind-up a trading company. The court has to look at all circumstances relating to the facts which bring about presentation of a winding-up petition. I have gone into all the facts given or shown to me as far as possible and I entertain no doubt that debt on which this petition is founded is substantially disputed by the company by virtue of the cross-claim in H.C.C.C. NO of 686 of 1984 which cross-claim is substantially more than the debt here.

I therefore dismiss this petition with costs to be paid by the petitioner.

October 23, 1986

Shah, J