



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 98 OF 2017

BETWEEN

PRIDEINN HOTELS &

INVESTMENTS LIMITED.....APPELLANT

AND

TROPICANA HOTELS LIMITED.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Mombasa (Otieno, J.)

dated 22nd September, 2017

in

Winding up cause No. 2 of 2016)

JUDGMENT OF VISRAM, J.A

1. Before us is an appeal against the ruling of the High Court, (Otieno, J.) dated 22nd September, 2017 wherein a liquidation order was issued against **Prideinn Hotels & Investments Limited** (the appellant). However, pursuant to this Court's order dated 8th February, 2018 **Tropicana Hotels Limited's** (the respondent) application dated 21st December, 2017, challenging the competency of this appeal, was canvassed together with the appeal. Consequently, this judgment will encompass our decision on both the application and the appeal.

2. I will first deal with the application since if it succeeds, it would definitely dispense the appeal. The application which is premised under **Rule 84** of the **Court of Appeal Rules** (the Rules) seeks *inter alia* that the notice of appeal and the record of appeal be struck out for the reason that the notice of appeal was filed out of time.

3. I cannot help but note that the notice of appeal in question bears a High Court stamp indicating it was filed on 25th September, 2017 and an endorsement by the Deputy Registrar that it was lodged in the same court on 21st November, 2017. Perhaps this is the reason why each party has taken a diverse stand on when the notice of appeal was lodged.

4. According to the respondent, there is a distinction between filing and lodging a notice of appeal. On the one hand, filing is when a notice of appeal is deposited at the registry after making the requisite payment. Lodging, on the other hand, with relation to **Rule 75** of the Rules, is when the notice is signed by the Deputy Registrar of the High Court. According to the respondent, because the notice of appeal was lodged on 21st November, 2011, it was out of time and should be struck out. Similarly, the record of appeal which is based on the defective notice of appeal should suffer the same fate.

5. On its part, the appellant contends that the notice of appeal was filed on 25th September, 2017 as indicated by the court's stamp affixed thereon. This was three days after the impugned ruling was delivered, hence the same was filed within time. The fact that the Deputy Registrar signed the notice of appeal on a different date, that is, 21st November, 2017 did not derogate that the same was filed on time. Besides, a litigant has no control over the court's administrative matters.

6. Under **Rule 75 (1)** of the Rules, any person who desires to appeal to this Court must give a notice in writing which should be lodged in duplicate with the Deputy Registrar of the High Court. **Sub rule (2)** thereof stipulates that the notice should be lodged within 14 days of the date of the decision against which it is desired to appeal. So when did the appellant lodge the notice of appeal?

7. To begin with I respectfully disagree with the respondent's argument that there is a distinction between filing and lodging a document in court. To me, those words mean one and the same thing. Our position is reinforced by the **Black's Law Dictionary, 9th Edition** definition of the word file:-

“1. To deliver a legal document to the court clerk or record custodian for placement into the official record... Also termed lodge.”

Thus, the use of one word over the other is just a matter of preference.

8. It is not in dispute that the appellant presented the notice of appeal at the High Court registry, paid the requisite fees, and a stamp was affixed on the face of it signifying its receipt. As a result, I find that the notice of appeal was lodged/filed on the date reflected by the High Court stamp. Taking into account that the impugned decision was delivered on 22nd September, 2017 it is clear that the notice of appeal, which was filed on 25th September, 2017, was filed within time.

9. I understand the purpose of the Deputy Registrar endorsing such a notice is to indicate the date it was lodged in the High Court. As to why the Deputy Registrar, in this particular case, signed the notice of appeal in question on 21st November, 2017 as opposed to the date it was filed is a question which can only be answered by the said Deputy Registrar. Be that as it may, the appellant cannot be held responsible for the Deputy Registrar's late action. See this Court's decision in **Sacco Societies Regulatory Authority vs. Biashara Sacco Society Ltd [2013] eKLR**. Having expressed myself as herein above, I am clear in my mind that the appeal before us is competent.

10. Turning to the merits of the appeal, the respondent is the owner of parcels of land it described as portion Nos. 775 and 776 situate in Malindi Municipality in Kilifi. By a lease agreement dated 13th September, 2011 between the respondent, on one part, the appellant, on the second part, and the respondent's guarantors, on the third part, the respondent leased out a hotel known as Eden Roc Hotel (suit premises) which is erected on the said parcels to the appellant. The terms of the lease included that the lease period was for 10 years commencing on 17th September, 2011. The appellant was required to pay a deposit of Kshs.12,500,000 which was refundable at the end of the lease period. The appellant was also under an obligation to pay rent at a graduated rate as follows:-

i. From the date of commencement until completion of the construction of the conference hall a monthly rent of €20,000.

ii. Upon completion of the hall a monthly rent of € 25,000.

iii. From the beginning of the sixth year up to the end of the Tenth year, that is 17th September, 2016 until 16th September, 2012 monthly rent of € 30,000.

11. In accordance with the lease agreement, the appellant paid the requisite deposit and took possession of the suit premises. Apparently, by then the respondent had not terminated an earlier lease granted in the year 2010 in favour of Caracas Holding Limited (Caracas). In addition, Caracas had engaged Platinum Resort & Spa Limited (Platinum) vide an agreement dated 15th September, 2010 to manage the suit premises. For one reason or the other the two fell out culminating in the removal of Platinum from the suit premises. Platinum did not take its ejection lying down but filed suit in the High Court being H.C.C.C No. 151 of 2011. It is through that suit that Platinum obtained interlocutory orders which it used to evict the appellant who was then in possession. Thereafter, Platinum withdrew the case and handed over possession to Caracas. In turn the respondent terminated the earlier lease with Caracas.

12. Still keen on giving effect to the lease dated 13th September, 2011 the parties thereto entered into a Deed of Variation dated 2nd November, 2011. It is by that deed that the respondent exempted the appellant from paying rent for the period it was not in possession of the suit premises. Likewise, the commencement of the lease was varied to 1st November, 2011. About a month later, it seems the parties entered into an agreement to carry out renovations and other works on the suit premises. It was agreed between the parties that the respondent was to carry out the renovations and other works therein all valued at Kshs.50,000,000 which would be reimbursed by the appellant with interest for over a 5 year period. The applicable interest rate was the prevailing lending rate by Fidelity Commercial Bank.

13. Once again the parties' relationship was hit by a glitch, this time round the appellant wanted to opt out of the lease agreement. According to it, the state of the suit premises coupled with other circumstances rendered it impossible to achieve its objectives under the lease. Thus, by a surrender of the lease dated 16th March, 2012 the parties agreed that surrender would take effect on or before 31st March, 2012 subject to the following conditions:-

“

1. ...

2. The tenant will pay the landlord the sum of Kshs. 25,000,000 being 50% of the landlord's costs of the renovation and other works on or before 31st March, 2012.

3. The tenant will pay the landlord the sum of €69,600 being three months' rent inclusive of VAT as partial consideration of the lease.

4. ...

5. ...

6. The landlord will refund to the tenant 50% of the deposit, that is to say the sum of Kshs.6,250,000 in three equal monthly instalments payable on or before the end of April, May, and June, 2012.

7. The landlord will refund the other 50% of the deposit that is to say the sum of Kshs.6,250,000 to the tenant in three equal monthly instalments payable at the end of January, February, and March, 2013.

8. The refund of Kshs.6,250,000 under clause (6) and Kshs. 6,250,000 under clause (7) above is conditional upon the tenant having paid the sum of Kshs. 25,000,000 and €69,600.

9. The landlord will refund the tenant the sum of Kshs.25,000,000 which shall have been paid under clause (2) upon the sale of the premises described in the lease or within seven years and six months from the date hereof whichever comes earlier.

10. The Tenant will pay the landlord the sum of Kshs.765,000 being refund of the stamp duty paid by the landlord on behalf of the tenant on registration of the lease and the charges of registering the lease and the Deed of variation and stamping the renovation agreement.”

14. Nonetheless, neither the appellant nor its guarantors honoured the terms of the surrender of the lease. Apprehensive that the respondent would demand payment of the amount thereunder, the appellant and its guarantors made a payment proposal and undertaking dated 4th April, 2012 which was accepted by the respondent. In consideration that the respondent would hold back on serving a statutory notice for winding up the appellant and/or taking action against the guarantors, the appellant and its guarantors not only agreed to pay the outstanding amount but also the legal fees of Kshs.120,000 which the respondent had so far incurred in commencing recovery of the amount. In particular, they agreed to offset the amount in the manner set out herein below:-

i. The sum of €69,600 by post-dated cheques-

a. The sum of €23,200 on or before the end of 4th April, 2012.

b. The sum of €23,200 on or before 15th May, 2012.

c. The sum of €23,200 on or before 15th June, 2012.

ii. The sum of Kshs. 25,000,000 together with interest thereon agreed at 26% per annum totalling to Kshs. 19,910,724 bringing the total of the principal together with such interest to Kshs. 44,910,724 in consecutive and equal monthly instalments of Kshs. 748,512.06 commencing on 31st May, 2012...

iii. The sum of Kshs. 765,000 under clause 11 of the surrender of lease in post-dated cheques –

a. Kshs. 255,000 on or before 31st May, 2012.

b. Kshs. 255,000 on or before 30th June, 2012.

c. Kshs. 225,000 on or before 31st July, 2012.

iv. The sum of Kshs. 120,000 on or before 4th April, 2012.

15. The appellant made good on its word and paid the aforementioned amount save for the principal renovation amount of Kshs.25,000,000 and interest thereon. Towards that end, it is common ground that the appellant drew monthly posted cheques for a sum of Kshs.730,000 beginning May, 2012. The cheques in respect of the months of May and June were honoured. However, the cheque in respect of the month of July, 2012 upon presentation was dishonoured because the appellant had stopped the payment. Henceforth the respondent did not present the other post-dated cheques for payment and informed the appellant of the same.

16. Still the appellant did not make any further payments on the said sum which continued accruing interest. Subsequently, on 2nd June, 2016 the respondent served the appellant with a notice demanding payment of the amount which then stood at Kshs.69,353,908.20. After the lapse of 21 days from the date of service of the notice, the respondent filed a petition in the High Court seeking the winding up of the appellant on the ground that it was unable to pay its debts.

17. In response, the appellant through its director, Shabbir Mohamed Kassam, denied owing the respondent Kshs.69,353,908.20 let alone any amount. He deposed that the appellant had paid the amounts under the surrender of the lease; that the amount of Kshs.25,000,000 in respect of renovation of the suit premises did not qualify as a debt, as the same was recoverable from the appellant; that the parties had by an oral agreement agreed that upon the payment of the first instalment, the respondent would furnish the appellant with renovation approvals and a certificate of completion as evidence of the renovations undertaken; that the respondent had defaulted in its undertakings hence the appellant was justified in stopping further payments. He also alleged in his

deposition that the appellant had been coerced into the agreements in question.

18. Upon weighing the evidence and arguments put forth by the parties, the trial court, (Otieno, J.) by a ruling dated 22nd September, 2017 found in favour of the respondent. In that regard he issued the following orders:-

i) The company, Prideinn Hotels Investments Ltd has shown inability to pay the debt owed to the petitioner in the sum given Kshs. 69,353,908 as at 31/5/2016 and is for that reason placed into liquidation until such debt shall have been paid or otherwise discharged.

ii) I appoint the Official Receiver as the interim liquidator of the company.

iii) For purpose of this order the appointment takes effect forthwith but the official receiver must take charge and running of the affairs of the company not later than the 1/10/2017.

19. It is that decision that is the subject of the appeal before us which is predicated on the grounds that the learned Judge erred in law and fact by:

a. Finding that the competency of the petition could not be revisited yet the ruling dated 9th June, 2017 deferred its determination at the conclusion of the petition.

b. Finding that there existed a debt which had not been substantially or reasonably disputed by the appellant.

c. Failing to address himself on the appellant's solvency despite the same being raised.

d. Approving that the debt stood at Kshs. 69,353,908 without evidence of how it was arrived at and contrary to the in duplum rule.

e. Failing to appreciate that liquidation ought to be a measure of last resort.

f. Issuing orders which had not been sought.

20. The appeal was disposed by written submissions as well as oral highlights. Mr. Kongere appeared for the appellant while Mr. Kinyua appeared for the respondent.

21. It was the appellant's submission that although competency of the petition was raised in a preliminary objection which was the subject of a ruling dated 9th June, 2017, the same was not decided with finality. Consequently, the learned Judge should have considered and made a determination on that issue. If he had done so he would have realised that the court had no jurisdiction to entertain the petition.

22. Faulting the learned Judge for finding that the debt was undisputed, Mr. Kongere argued that the appellant had demonstrated the existence of several disputes with regard to the debt. First, the appellant's director deposed that the appellant was coerced into the lease in question. We understood the appellant's contention to be that it was interested in leasing Sai Roc Resort and Spa which was owned by ALSAI Kenya Limited. The directors of ALSAI Kenya Limited who happen to be the directors of the respondent coerced the appellant to also lease the suit premises as a condition of leasing Sai Roc Resort and Spa. Second, the respondent misrepresented the status of the suit premises which at the time was in possession of another party and in a deplorable state. Third, the appellant was not indebted to the respondent since the respondent owed it a total Kshs.27,500,000 under the surrender of the lease. Fourth, the appellant denied owing the respondent any money.

23. Moreover, even if the appellant was indebted to the respondent, which assertion was denied, that by itself could not justify winding up of the company. Proof of the appellant's inability to pay the debt or in other words insolvency was necessary before such an order could issue. To that extent, counsel relied on this Court's decision in ***Intona Ranch Ltd. vs. Joseph Thomas O'Brien [1992] eKLR***. He added that the appellant had produced credit reports which were a testament of its solvency.

24. Besides, taking into account that the objective of the ***Insolvency Act*** is to enable companies to continue as going concerns, the learned Judge failed to appreciate that an order of winding up should only be issued as a last resort. Rather, he should have considered the best option other than winding up which was draconian in the circumstances. In support of that proposition, we were referred to the persuasive High Court's decision in ***Re Spencon Kenya Limited [2016] eKLR***.

25. Mr. Kongere took issue with the learned Judge holding that the undisputed debt was Kshs. 69,353,908 yet there was no evidence to back up the same. According to him, the learned Judge also erred by failing to appreciate that the amount in issue substantially comprised of interest that was contrary to the *in duplum rule*. Counsel urged us to allow the appeal on those grounds.

26. In opposing the appeal, Mr. Kinyua submitted that the *in duplum* rule was not applicable in the circumstances. The rule only applies to formal lending by financial institutions and not in private contracts, as is the case here. Buttressing that line of argument he relied on this Court's decision in ***Lee G. Muthoga vs. Habib Zurich Finance (K) Limited & Another [2016] eKLR***. He went on to state that there was no proof that the appellant had been coerced to enter into the agreements between the parties. The appellant had every opportunity to decline any agreement with regard to the suit premises if it so desired. Taking the entire evidence as a whole and more specifically the agreements in question, it was clear that the appellant had admitted the debt and even made proposal to pay the same. As far as he was concerned, the appellant was challenging for the first time the amount of the debt. In the High Court the appellant's position was that there was no debt at all.

27. On the issue of solvency, Mr. Kinyua urged that the burden lay with the appellant to prove it was solvent which it failed to do. Moreover, the failure to pay an admitted debt was proof of the appellant's insolvency.

28. I have considered the record, submissions made on behalf of the respective parties and the law. In doing so, we are aware of our mandate under **Rule 29 (1) (a)** of the Rules as the first appellate court is to re-appraise the evidence and draw our own inferences of fact. We are also conscious that the decision of the trial court is entitled to some measure of deference unless the conclusions made on the evidential material on record are perverse or the decision as a whole is bad in law. See ***Selle vs. Associated Motor Boat Company Ltd [1968] EA 12***.

29. My perusal of the ruling dated 9th July, 2017 revealed that the learned Judge while considering a preliminary objection raised by the appellant on the competency of the petition, conclusively pronounced that the petition was properly before the court. That is as much as I am willing to say on that ground since that decision is not subject of the appeal before us.

30. From the facts of this case it is without doubt that the parties entered into several agreements which regulated their relationship and obligations thereunder. In my view, the appeal turns to a substantial extent on the construction of these agreements. However, before looking at the import of the agreements there is a pertinent issue to consider. Were the agreements in question made through coercion and/or misrepresentation as alluded to by the appellant?

31. Having perused the record and considered the evidence therein, I, like the learned Judge, do not find any element of coercion as against the appellant. Apart from alleging that it was coerced by the directors of ALSAI Kenya Ltd. to enter into the lease in issue, the appellant did not adduce any evidence to support that contention. With respect to misrepresentation, the Deed of variation was crystal clear on the appellant's willingness to continue with the lease even after the earlier lease in favour of Caracas was terminated hence it could not rely on the same to vitiate the lease.

32. Having found that the parties entered into the agreements voluntarily, I now consider what their intention was thereunder. The object of construction of terms of a contract is to ascertain its meaning or in other words the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather what a reasonable person in the position of the parties would have understood the words to mean. See. ***Investors Compensation Scheme Ltd vs. West Bromwich Building society [1998] 1 W.L.R 896***.

33. Applying the aforementioned principle to the facts before us, I find that the appellant and its guarantors admitted the appellant's indebtedness as per the terms set out in the surrender of lease. Furthermore, both parties agreed that the appellant had made partial payment of the debt in question as per the payment proposal. It is common ground that the appellant did not pay Kshs.25,000,000 in respect of the renovations done and interest thereunder save for the two instalments of Kshs.730,000 each. The appellant acceded as much by stating that it halted the payment of the said amount after the respondent defaulted on the terms of the oral agreement.

34. On the alleged oral agreement, I concur with the learned Judge that there is no evidence that the parties concluded such an agreement. Accordingly, it could not be a basis of varying the terms of the payment proposal. Lord Morris in ***Bank of Australia vs. Palmer [1897] A.C 540*** succinctly stated that:

"... parole testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties deliberately agreed to record any part of their contract."

35. In light of the circumstances of the case and more so, the fact that the appellant had not met its obligations under the surrender of lease and payment proposal, the respondent's aforementioned obligations thereunder had not arisen. As per clause 8 of the surrender of lease, the appellant was entitled to refund of the deposit only after paying Kshs.25,000,000 for the renovation and the interest thereunder. Similarly, under clause 9, the respondent was to reimburse the appellant the sum of Kshs.25,000,000 after seven years and six months of payment of the same or after the sale of the suit premises which ever came earlier. For that reason, I am satisfied that the respondent did not owe the appellant any money.

36. All in all, I find that there was no bonafide dispute on the appellant's indebtedness. As to the extent of its indebtedness, it was the respondent's uncontroverted evidence that the amount which stood at Kshs.44,910,724 on 4th April, 2012 when the payment proposal was made, had escalated to Kshs.69,353,908 on account of accrued interest. Further, I decline to accede to the appellant's invitation to find that the *in duplum* rule was applicable. The said rule is only applicable in cases of loans or financial facilities offered by financial institutions as defined under the **Banking Act**. My position is reinforced by this Court's decision in ***Lee G. Muthoga vs. Habib Zurich Finance (K) Limited & Another (supra)***.

37. By virtue of **Section 384(1) (a)** of the **Insolvency Act** a company is deemed as being unable to pay its debts if-

"... a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;..."

38. This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the **Insolvency Act** or the **Companies Act** which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the **Insolvency Act** which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

39. Based on the foregoing, the appeal lacks merit and is hereby dismissed with costs. However, I hereby suspend the order of liquidation of the appellant for a period of 30 days to enable the appellant to make full payment of all the moneys due failing which the orders of this Court shall stand final.

As Koome, J.A agrees the orders outlined herein shall be the orders of this Court.

Dated and delivered at Mombasa this 22nd day of March, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KOOME, JA

I have had the advantage of reading in draft the judgment of Visram, JA. I respectfully agree with it and I have nothing useful to add. I, like, Visram JA, would dismiss the appeal with costs.

Dated and delivered at Mombasa this 22nd day of March, 2018

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF W. KARANJA, JA.

1. I have read the draft judgment of my brother Visram JA, which sets out in fine detail the facts surrounding this appeal, and the issues of law involved. I do not find it necessary to recapitulate the same for purposes of this brief judgment. Suffice it to say that I agree with his analysis of the issues and the conclusions drawn in respect of most of these issues. My point of departure however is in respect of the ultimate finding and determination of the appeal, for reasons given hereunder. In my view before an aggrieved creditor can file a winding up petition against a company, or before the Court can give orders of winding up a company, there must be evidence that all other efforts to recover the debt have failed to yield the desired result. The Court that is called upon to make a winding up order should in my view establish if there exists an alternative remedy to the creditor that is less draconian than a winding up order. I say so because winding up should in my view be the last resort. For me it means passing a death sentence on a company and killing all hope of its resuscitation. I echo the words of Ringera J. (as he then was) in **JAMBO BISCUITS (K) LTD. v BARCLAYS BANK OF KENYA LTD. ANDREW DOUGLAS GREGORY AND ABDUL ZAHIR SHEIKH (2003) 2EA 434** when he stated that;

“...The receivership would most probably result in the complete destruction of the business and goodwill of the company...And I think it is a notorious fact of which judicial notice may be taken that receiverships in this country have tended to give kiss of death to many a business”.

2. If some life can be breathed into a struggling company to enable it meet its obligations, then why would a creditor acting in good faith push it off the precipice? If the winding up order is sought because the company has been unable or reluctant to pay a debt, the court should consider if alternative remedies exist which can at the end yield the same result.

3. In this case, like my brother Judge, I appreciate that the debt is admitted as various correspondence in the record between the parties reveal. Even if the debt is disputed, why would the respondent not file a suit for summary judgment in an ordinary civil suit? The remedy would be just as fast and expedient as a winding up order. I am concerned about the larger picture and the fate of other creditors like the

Diamond Trust Bank who are owed much more money by the appellants, by way of loans which the appellant has been servicing regularly. In the event the appellant is wound up, and placed under receivership, the impact of that decision will reverberate far and wide and create ripples in the entire business community, not to mention that it would affect the appellant's credit ratings very adversely. Some of the creditors mentioned in the record of appeal, like Diamond Trust Bank and others who are owed huge amounts of money by the appellant would certainly stand to lose their money.

4. There must in my view, be other ways for the respondent to recover its debt than by way of liquidation of the appellant which is still on its feet, may be limping, but definitely still on its feet. I am convinced that the respondent is just using the winding up avenue to put pressure on the appellant to settle the debt in question. This in my view is the wrong route. This Court faced with a similar situation in **Intona Ranch Ltd –vs- Thomas O'Brien** (1992) eKLR cited the time tested decision in **Re The London wharfing and Ware Housing Co. Ltd** (1865) 35 BEAU 808, 809, where 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 legitimate to present a petition to wind up a company... 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 up.”

This Court then went on to state:-

“The petition for 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”. (See also RAI vs RAI Civil Appeal No.63 of 2001)

This finding in my considered view is still good law, and it has been followed subsequently in several winding up cases that have become quite common in our courts in the recent past.

5. We were referred to documents showing that the appellant owes other people/ institutions money. It is servicing its debts with the banks, and I am not persuaded that the appellant is insolvent to an extent that the only cure available for it is a quick dispatch to the netherworld. An order winding up the company was not in my considered view the best remedies in the circumstances of this suit.

For the foregoing reasons, I am unable to concur with my brother and sister Judges on the result of this appeal. I would allow this appeal, with no order as to costs. However as the majority are in favour of dismissing it, then their decision will carry the day.

Dated at Mombasa this 22nd day of March, 2018.

W. KARANJA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR