



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, MUSINGA & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO.327 OF 2003

BETWEEN

GLOBAL TOURS & TRAVELS LIMITED.....APPELLANT

AND

FIVE CONTINENTS TRAVEL LIMITED.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nairobi

(Ringera, J.), dated 8th Many, 2001 in H.C.C.C. No.43 of 2000)

JUDGMENT OF THE COURT

This is an appeal from the Ruling of the High Court (*Ringera, J.*, as he then was), dismissing an application made by the appellant herein to strike out a winding-up petition brought against it by the respondent herein.

By a winding-up petition dated 5th September, 2000, the respondent, Five Continents Travel Limited sought the winding-up of Global Tours & Travel Limited (appellants) under the Companies Act on the ground that the appellant was indebted to it in the sum of Sh.1,099,399/= being the amount due for ticket sales and which the appellant had failed to pay within 21 days since the demand for payment was made. The petition was verified by an affidavit of *Dilip Shah*, a director of the respondent.

The appellant filed a statement and grounds of objection and a replying affidavit sworn by *Harshadrai Manilal Parekh* – a director of the appellant on 6th November, 2000. Documents annexed to the replying affidavit showed that the winding-up petition was advertised in the “Daily Nation” newspaper on 23rd November, 2000 and published in the Kenya Gazette on 8th December, 2000.

The gist of the replying affidavit was that the respondent had various transactions relating to the sale of air tickets not only with the appellant but also with the appellant’s sister company – Global Travels Limited, (sister company), that during the period between February, 1999 and August 1999, the respondent owed the appellant’s sister company a sum of Shs.1,213,133/75, which the respondent was unable to pay; that it was agreed between the three entities that the appellant and its sister company would purchase air tickets at discounted rates from the respondent so that the respondent in due course would clear the amount it owed; that the appellant and its sister company duly purchased air tickets from the

respondent; that from that transaction the respondent owed the appellant's sister company a sum of Shs.1,744,551/17 which was greater than the Shs.1,009,399/= demanded by the respondent and that the respondent cannot file a winding-up petition when the accounts are in dispute.

In February, 2001, the appellant filed an application to strike out the winding-up petition on the grounds, *inter alia*, that the petitioner had no *locus standi* to present the petition as it was not a creditor; that the alleged indebtedness was disputed on *bona fide* grounds and that the petition was brought for debt collection purposes and in bad faith.

The application was supported by the affidavit of **Harshadrai Manilal Parekh** in which he restated the facts contained in the previous affidavit in answer to the petition. In addition, he disclosed that he and **Ramesh Manhilal Parekh** are directors of the appellant and its sister company and deposed in paragraph 15 thereof thus;

"...I know of my own knowledge that the petitioner owes Global Travels Ltd more money than it is allegedly owed by the respondent."

The application was opposed on the grounds contained in the replying affidavit of

Dilip Shah who deposed, amongst other things, that, there was no money due and owing from the petitioner to Global Travels Limited and that even if the respondent owed money to the appellant's sister company there was no agreement in existence binding it from seeking recovery of money owed to it by the appellant in consideration of Global Travels Ltd not making any demand for sums owed to it by the respondent.

On the issue of *locus standi*, the learned judge said:

"In short, I think the authorities show that in determining whether an alleged creditor has locus standi to present a petition, the court must consider the question whether the alleged debt is disputed on a substantial ground. If it is, he is not a creditor within the meaning of the law. If it is not, he is a creditor. The alleged debt need not be clearly and unequivocally admitted by the company."

The learned judge next considered whether the debt was disputed on a substantial ground. The court agreed with the respondent's submissions that the appellant and its sister company were distinct entities in law and that an assignment of an actionable claim can only be validly effected in law by a written instrument and concluded:

"...I find that the petitioner's debt is being disputed on a misconceived ground which is frivolous in law. There is therefore no substantial dispute on the respondent's indebtedness to the petitioner. That being so, I find the petitioner is a creditor within the meaning of section 220(a) of the Companies Act and has locus standi to present the petition."

By a Ruling dated 4th March, 2012, the learned judge after dismissing the application, stayed further proceedings in the cause pending appeal.

The appeal is based on grounds, *inter alia*, that, the learned judge erred in law and in fact; by failing to find that the petitioner, had no *locus standi* as the appellant had not admitted indebtedness or adjudged as a creditor in any previous proceedings; by ruling that the debt was being disputed on misconceived grounds when there was sufficient evidence that the petitioner was indebted to the appellant's sister company, and, in failing to make a finding that the petitioner had failed to prove that the appellant was unable to pay its debts.

Mr. Tiego, learned counsel for the appellant, reiterated his submissions in the High Court and submitted that the debt was disputed on substantial ground, that the debt had not crystallized and that this was a case for taking accounts and set-off.

On the other hand, **Mr. Ogalo**, learned counsel for the respondent, emphasized that the petition was grounded on the indebtedness of the appellant; that there was no evidence to show that appellant was a sister company to Global Travels Ltd and that the issue of a tripartite agreement was considered and rejected.

We have considered the respective submissions. The grounds on which a court can make a winding-up order are set out in section 219 of the Companies Act. One of the grounds as section 219(e) stipulates is if:

“the company is unable to pay its debts.”

Further Section 220 provides:

“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 its 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)

...

(c)

if it is proved to the satisfaction of the court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the court shall take in account the contingent and prospective liabilities of the company.”

It is apparent from the contents of the petition that the petition was based on ground (a) i.e. neglect to pay and not on ground (c) i.e. insolvency. The respondent averred in the petition that on 6th July, 2000, it sent a demand letter to the appellant calling upon it to pay the sum demanded within 21 days. The petition quoted the terms of the demand letter and averred that the appellant neglected to pay, to secure or compound the debt within the period of the demand notice.

By a letter dated 1st August, 2000, the appellant’s advocate replied to the demand notice partly thus:

“It is true that there has been various correspondence between your client and our client and our client’s sister company Global Travels Ltd. Our client denies that it owes Shs.1,009,399/= to your client . It seems your client (sic) calculations are incorrect. On the contrary according to our client’s calculations your client owes to our client Shs.1,567,758/95.

When your client could not pay the amount due to our client i.e. Global Travels Ltd your client suggested that our client and its sister company Global Tours & Travels Ltd buys tickets to set off amounts due to Global Travels Ltd. Your client also agreed to pay interest on the amount.”

Thus, the appellant’s answer to the demand to pay was that the respondent owed the appellant’s sister company Shs.1,567,788/95 a sum which was more than the amount that the respondent was demanding and which, by an agreement was to be set off by purchase of air tickets from the respondent. In other words, the appellant was disputing the debt in the demand letter on the ground that the respondent owed the appellant’s sister company a larger sum which had not been settled.

By section 220(a), a precondition for presentation of a winding-up petition on ground of neglect to pay is that the petitioner should be a creditor. For one to qualify as a creditor, it is not necessary, contrary to the contention of the appellant, that there should have been a prior admission of the debt or adjudication of liability in previous proceedings. However, if the respondent in answer to the petition raises a substantial dispute as to the existence of the debt, the respondent would not be held to have neglected to pay as in such a case, the petitioner would not be a creditor with *locus standi* to present the petition (See **Re Lympne Investments Ltd, [1972] 2 All ER 2895.**)

The petition did not proceed to hearing. Had it gone to hearing, the respondent would have been required to prove the debt and the appellant would have been afforded an opportunity to show that the debt is disputed on substantial grounds.

The appellant instead brought a pre-emptive application to strike out the petition. The grounds of the application have already been stated. Since the petition was not based on the ground of insolvency of the appellant, and since the petition was not heard, the complaint that the respondent failed to prove that the petition was unable to pay its debts does not arise and is without merit.

The petition was based on the ground of neglect to pay a debt arising from a business transaction between the respondent and the appellant. The appellant did not expressly dispute the specified debt. The appellant in its answer to the petition merged its account with the respondent with the account between the respondent and Global Tours Ltd relating to a different transaction to raise an issue of account between the three entities and the dispute on its indebtedness. The finding of the High Court that the appellant and its sister company Global Tours Ltd are separate and distinct entities in law has not been faulted. Further, the finding of the High Court that, in law, an assignment of an actionable claim can only be effected by written instrument has not been impugned. Indeed, that is the correct position in law as stipulated by section 130 of the Indian Transfer of Property Act. The appellant did not contend and has not contended that Global Tours Ltd had legally assigned its claim against the appellant to it. The account of a third party with the respondent could not be used to settle the account between the respondent and the appellant in the absence of a lawful assignment.

In the premises, the finding of the High Court that there was no substantial dispute on the appellant's indebtedness to the appellant is undoubtedly correct in fact and in law.

In the result, the appeal is without merit and is dismissed with costs to the respondent. The petition shall proceed to hearing as ordered by the High Court.

Dated and delivered at Nairobi this 24th day of April, 2015

E. M. GITHINJI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR