



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 18 of 1995

Mbwanji Ltd v In the Matter of Companies Act

Ruling.

This is an application by the Company seeking the striking out of the petition to wind it up. The application also seeks other and or further relief or orders to be granted.

In an affidavit sworn on 13.6.95 the Company denies owing the Petitioner the Kshs 7,228,478/65 upon which the petition is founded upon. It is contended that the Petition is meant to harass and destroy the company which is quite solid financially. It is admitted that the petitioner granted the company a loan of Kshs 7 million in respect whereof a consent order for payment of the same was made in HCCC No 310 of 1990 MBWANJI LTD VS DFCK LTD. Before that suit the company had paid Kshs 8,298,709/85 and since that order the company had paid Kshs 9,250.00. In all the company has now paid the Petitioner Kshs 17,548,709/85.

That according to the company it has repaid the entire loan and has complied with the consent order aforesaid and is disputing the Kshs 7,228,478/85. In any event the company has secured payment due to the Petitioner by a charge over Title No NDUMBERI/NDUMBERI/T.613/30. The Respondent Petitioner opposes the application to strike out the Petition. The Kshs 7 million was to be repaid by fourteen semi annual instalments of Kshs 0.5 million payable on 30.6 and 31.12 in each year. The loan was to carry interest at 15% p.a. and in default of any instalment on due date the company would pay interest at 17% on the sum remaining in default. Default in any instalment would entitle the Petitioner to call for payment of the sum outstanding.

This loan was to be used by the company to construct and install a wheat and animal feed mill on plot No. NDUMBERI/NDUMBERI/T.613/30. The company defaulted in the repayment of the said loan and the Petitioner called upon the company to pay the whole loan. The company sued the Petitioner to stop realisation of the security. The suit was dismissed with costs and provided payment of Kshs 7.6 million by December 1990 and thereafter payment of all amounts outstanding by October 30, 1991. In default, the Petitioner would be entitled to realise its security including appointment of receiver under the charge. The company breached the court order as cheques it issued for payment, were dishonoured by the company's bank. By December 31, 1994 the company acknowledged its indebtedness to the Petitioner in the sum of Kshs 6 million but it was not paid subsequently as promised.

In the light of the clear admission of this debt the company should not now be heard to deny it. There

is therefore no genuine dispute regarding the company's indebtedness to the Petitioner and the belated dispute being raised now is not bona fide and the same is merely calculated to delay payment by the company of the amount properly and justly due to the Petitioner.

As no factory was constructed by the company on the plot intended the security held by the Petitioner is therefore insufficient to cover the large amount outstanding from the company. The company is not solvent. It is indebted to various other organisations. There are undischarged mortgages and charges to the tune of Kshs 79 million. The Notice of Motion should therefore be dismissed. In MANON & ANOTHER VS GOLDSTEIN & ANOTHER in which it was held that where the indebtedness was disputed the Petitioner would not be entitled to wind up the company and had no locus standi to present the petition and the companies and the companies Court was not appropriate court to decide the dispute. The presentation of that Petition was an abuse of the process of the Court.

I would agree with Mr Raiji for the Petitioner that there is no bona fide dispute here to warrant the striking out of the petition. The consent order reached in HCCC No 310 of 1990 had not been complied with. After the first three instalments the rest were not paid in time as agreed. That led to the accrual of interest as agreed in the constant order. By February 1994 total amount owed by the Petitioner is Kshs 6,282,050/10 which is admitted by the company in its letter of February 12, 1994. That has not been paid as the company agreed. The amount due is also in excess of the security as the company did depart from the loan agreement to enhance the security by the construction of the work that was envisaged. The company owes other creditors some Kshs 79 million. It is therefore not solvent as contended for by it. Accordingly I agree with the petitioner that since the alleged dispute is not based on any substantial ground and it is not bona fide, I decline to strike out the petition and the company's application for that purpose is dismissed with costs.

March 25, 1996

Keiwua, J



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