REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Winding Up Cause 11 of 1991

In The Matter of East African Road Services Ltd and In The Matter of The Companies Act

Ruling.

By its petition filed in this court on 16th April, 1991, Kenya Shell Limited, a limited liability company (hereinafter called the petitioner) seeks an order for winding up of East African Road Services Limited, a limited liability company with its registered office in Nairobi (here in after called the company) on the grounds that the company is unable to pay its debts (s.219 (e) of the Companies Act).

The company is indebted to the petitioner in the sum of shs 2,207,130/15 for goods sold and delivered. The petitioner served on the company, on 16th October, 1990, a demand and notice in accordance with s.220 (a) of the Companies Act. The company has since neglected to pay or satisfy the said sum in whole or in part or to make any offer to secure or compound the sum due to the petitioner.

The petition, of course, has been verified by an affidavit of a director of the petitioner sworn on 18th April, 1991.

The petition was served on the company on 29th April, 1991. It was duly advertised in the official gazette and the East African Standard. The compliance with rule 28, with regard to attendance before the deputy registrar to show that rules under winding up rules have been complied, has been made.

A number of creditors of the company have given notice of their intention to attend the hearing of the petition. The total value of the debt due to these creditors is about shs 10,363,322/= and all of them apparently support the petition. At least, those who appeared at the hearing on 31st October, 1991 lent their strong support to Mr Fraser who conducted the petition on behalf of the petitioner.

The company has failed to appear and apparently is not opposing the petition.

Be that as it may, the Receivers and Managers of the company who were so appointed by the Debenture Holders, Shelufa Ltd have appeared through Mr O.P. Nagpal. These Receiver /Managers do not oppose an order of the winding up by the court but seek directions of the court with regard to the appointment of a liquidator and they have put forward their names as suitable liquidators.

The petition not being opposed and the court being satisfied upon all that is on the record the company is unable to pay its debts, it is ordered that the company be wound up by the court. The costs of the petitioner and all those appearing at the hearing be paid out of the estate of the company.

I now proceed to the question of appointment of a liquidator consequent upon the winding up order made by the court.

S.234 of the companies Act generally gives power to the court to appoint a liquidator or liquidators.

S.235 with regard to appointment of an interim liquidator before the making of winding-up order does not apply but it is to be noted that where such interim liquidator is to be appointed, it has to be the official receiver.

The provisions of s.236 will apply with regard to the appointment of liquidators consequent upon a winding-up order being made. The relevant provisions of s.236 are as follows:-

"The following provisions with respect to liquidators shall have effect on a winding-up order being made –

"(a) the official receiver shall by virtue of his office become the provisional liquidator and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such:

(b) the official receiver shall summon separate meetings of the creditors and contributors of the company for the purpose of determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver."

Mr Fraser for the petitioner was of the view the court had no option but to appoint the official receiver as provisional liquidator by virtue of the above provisions of s.236.He was supported by the counsels who appeared for some of the supporting creditors.

Mr Nagpal was of the view that court has discretion as seen by s.234 which gives general powers to the court to appoint liquidator or liquidators. He submits that the present Receiver /Managers who have been so acting for over 10 months and against whom there is no complaint, would be suitable persons as liquidators. There is no reason why they should not be so appointed since no one has come up with anything against them. He also suggested that such appointment of Receivers/Managers as liquidators would save costs though he has not explained how it is so.

Both Mr Nagpal and Mr Fraser cited to me number of authorities with regard to the appointment of liquidators. These are (1) Buckley on the Companies Act 14th Ed. Vol I

(2) In re North Wales Gunpowder Company (1892) 2 QB 220. (3) In re John Reid & Sons Ltd (1900) 2 QB 634 (4) In re Karameli and Barnett Ltd (1917) 1Ch 203 and (5) Stead Hazel & Co v Cooper (1933) 1KB 840 (by Mr Frazer) and (1) Farrar's Company Law 2nd Ed. (2) Kerr on Receivers and (3) Joshua Stubbs Ltd 1Ch 475 (by Mr Nagpal).

From these authorities it is quite clear that "after an order for the winding up of a company has been made the court has no power to appoint a provisional liquidator other than the official receiver. "Our s.236 (a) and (b) is more or less identical with 2.239 (a) and (b) of the English Act. Reading for myself, I have no doubt that s.236(a) does not give any option to court to appoint a provisional liquidator other than the official receiver.

In Re North Wales Gunpowder case (supra) Lindley J (who had earlier in Jushua Stubbs case (supra) had held that court had discretion to appoint a liquidator) had this to say consequent upon new Act of 1890:-

"The language used in ss. 85, 86 and 99 of the Companies Act 1862 is very different to that which we find in the Act of 1890……The language is no longer optional. It is no longer optional to have a provisional liquidator appointed after the winding up. There are the officials of the court called the official receivers……They are the persons who under the Act are to be provisional liquidators after the winding up order, and they are to remain, so until other persons are appointed.

In Kerr on Receivers 16th Ed. At p.101 it is not unrecognised that it any be undersirable for one person to fill both posts (liquidator and receiver) as the interests represented may conflict."

In Farras Company Law 2nd Ed. P.395, the author has aptly contrasted and functions and responsibilities of the Receiver and the liquidator –

"A receiver, as we have seen, will typically be appointed to a company by a secured creditor e.g. a debenture holder under a floating charge, and his functions will be to pay off the debt of that secured creditor either from income receipts or asset realisations. A liquidator, on the other hand, represents the interests of all creditors but, in particular, the unsecured creditors. It is very likely that a company which has defaulted on a secured debt, leading to the appointment of a receiver, will be unable to pay its unsecured debts in full. The unsecured creditors may then choose to protect themselves by putting the company into liquidation and appointing a liquidator. When this happens, the receiver continues to act in exercise of his receivership powers but no longer as agent of the company, and the liquidator will watch over proceedings on behalf of other creditors of the company until the secured debt in respect of which the receiver was appointed has been discharged."

Mr Fraser has no quarrel with receivers continuing to act in exercise of their powers of receivership.

The object of official receiver being appointed a provisional liquidator until a meeting of creditors and contributors is held, is sound and wise as it gives creditors opportunity to express their views as to suitable and proper person who may be appointed liquidator or liquidator after such meeting is held.

As I am of the view that under s.236 (1) of the Act, I have no option but to appoint Official Receiver as a provisional liquidator, I do so order.

November 7,1991

Abdullah, J