



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

WINDING UP CAUSE 9 OF 2009

IN THE MATTER OF TRITON PETROLEUM CO. LTD

AND

IN THE MATTER OF THE COMPANIES ACT

EMIRATES NATIONAL OIL COMPANY (SINGAPORE) PRIVATE LTD.....APPLICANT

VERSUS

TRITON PETROLEUM CO. LTD.....RESPONDENT

RULING

It is a matter of public notoriety that Triton Petroleum Company Ltd (*hereinafter referred to as the company*) is a company in a hell of financial trouble. The company has been placed under receivership by two banks, namely Eastern and Southern Africa Trade and Development Bank and Kenya Commercial Bank Ltd. The two banks have appointed Abdul Zahir Sheikh and Peter Kahi as joint receivers and managers of all the assets and property of the company charged to the said banks as debenture holders. The company left many creditors, many of whom were unsecured in the wake of its financial troubles. One of the unsecured creditors is the applicant. In a petition filed before this court seeking to wind up the company under the provisions of **Section 219(e)** of the **Companies Act**, the applicant averred that the company was insolvent, was unable to pay its debts, and therefore should be wound up. The applicant averred that the company owed it the sum of US\$20,844,442.52 as at 15th January 2009 in respect of petroleum products that it had sold to the company, which sum includes storage penalties, demurrage charges, interest and financial cost. The winding up petition has been advertised and is yet to be heard and disposed off by the court.

On 16th June 2009, the applicant filed an application pursuant to provisions of **Section 235** of the **Companies Act** and **Rules 5, 7 and 27** of the **Companies (winding up) Rules** seeking the appointment of an interim liquidator of the company by the name of Ponangipalli Venkata Ramana Rao, a qualified certified public accountant pending the hearing and determination of the winding up petition. The applicant prayed that the said interim liquidator be granted powers by the court, *inter alia*, to trace, take possession of, collect, recover and protect the assets of the company under the powers set out in **Section 241** of the **Companies Act**. The applicant further prayed for an order of the court that the interim liquidator be paid out of the funds of the company at such rates or terms as to remuneration as the court

may deem fit. The grounds in support of the application are stated on the face of the application.

The application is supported by the annexed affidavit of Wu Tuck Leong, the mid office manager of the applicant. He swore an affidavit in further support of the application and in reply to an application filed by the receivers and managers of the company (*hereinafter referred to as the respondents*) seeking to either restrain the applicant from further proceedings with the petition or alternatively seeking to strike out the petition and the application that is the subject matter of this ruling. In the said application, the respondents contend that the applicant had failed to issue a statutory demand as provided under **Section 220(a)** of the **Companies Act**. The respondents were of the view that the petition was fatally defective for want of service of such notice. They contend that the applicant was not entitled to file winding up proceedings in view of the fact that the applicant's debt was seriously disputed on substantial ground as the oil that is the subject of the applicant's claim was secured by Kenya Pipeline Co. Ltd. The respondents argued that this court lacked jurisdiction under **Section 235** of the **Companies Act** to appoint an interim liquidator other than the official receiver in respect of a debt that is seriously disputed. The application is supported by the annexed affidavit of Zahir Sheikh.

Prior to the hearing of the application, counsel for the parties to this application agreed by consent to argue the two applications at the same time. They further agreed to file written submissions in support of their respective clients' cases. I heard oral submissions or arguments made by Mr. Gichuhi for the company, Mr. Ogonji for a creditor and Mr. Njogu for the petitioner. I have carefully considered the said submissions. I have also read the pleadings filed by the parties to this application, including the authorities cited by counsel for the parties in support of their respective opposing cases. Whereas the petitioner craves orders of this court for the appointment of an interim liquidator pending the hearing of the petition, on their part, the respondents have moved this court to either stay the winding up proceedings or alternatively strike it out on the ground that the applicant had failed to satisfy condition precedent for the filing of a petition for winding up the company. The issue for determination by this court is whether sufficient grounds have been established for the grant of either application. It was apparent that the parties to this application appreciated that the grant of one application would result in the dismissal or stay of the other.

Under **Section 235(1)** of the **Companies Act**, this court has powers to appoint the official receiver to be the provisional liquidator of the company at any time after the winding up petition has been filed and before the winding up order is made. Under **Section 235(2)** of the **Companies Act**, where such liquidator is appointed, the court may limit or restrict his powers by the order appointing him. The applicant has prayed that the court appoints a person it has suggested as the interim liquidator of the company pending the hearing of the winding up petition. It has also prayed that the said interim liquidator be vested with powers similar to powers enjoyed by a liquidator once a winding up order has been issued as provided under **Section 241** of the **Companies Act**. Having evaluated the facts of this case, is the applicant justified in applying for the appointment of an interim liquidator pending the hearing of the winding up petition? The applicant acknowledges that the respondents, as receivers and managers of the company duly appointed by the debentures holders, have priority in collecting and managing the assets of the company that is subject of the floating charge. The applicant impressed the court of its desire not to interfere with the property of the company that is the subject of the floating charges.

The concern of the applicant, as an unsecured creditor, is that the assets of the company which are not subject to the debentures, be collected and be preserved to protect the interest of unsecured creditors pending the hearing of the winding up proceedings. It was apparent to the court that there is tension between the applicant and the respondents concerning the manner which the respondents are going about their duties as receivers and managers of the company. The applicant appears justifiably apprehensive that the respondents may deal with the property of the company that is not subject to the debentures. The applicant is concerned by the fact that the respondents have been unwilling to provide information relating to the receivership of the company to the unsecured creditors, among them the applicant. In response to the applicant's apprehension, the respondent forcefully argued that if an interim liquidator is appointed by the court, it would interfere with their duties as provided in the debentures. The respondents were apprehensive that in the event that the court would grant the interim liquidator unlimited powers under **Section 241** of the **Companies Act**, it would lead to the usurpation of the powers of the receivers

and managers. The respondents proposed that the receivers and managers of the company be appointed as the liquidators of the company.

As stated earlier in this ruling, it is not disputed that the debenture holders, being Eastern and Southern African Trade and Development Bank and the Kenya Commercial Bank Ltd, were entitled to appoint receivers and managers upon forming opinion that the principal sums advanced to the company became payable pursuant to a lawful demand or as a result of an event of default as specified in the debenture. The two debentures that formed the basis of appointment of the receivers and managers are essentially similar. Under clause 12 of both debentures, the floating charge that is constituted by the debenture shall crystallize and attach by way of fixed charge to the property and assets of the company that comprise the subject of the floating charge.

It is evident from the said debentures that the debentures holders can only deal with the property and assets of the company that are the subject of the debentures. The receivers and managers have no business dealing with assets and property of the company that are not subject to the floating charge. I am therefore inclined to agree with the applicant that the unsecured creditors of the company cannot put at risk the property of the company that may be unsecured by allowing the possibility of the same to be diverted by the directors of the company to the detriment of the said unsecured creditors. I think the applicant made an appropriate case for this court to appoint an interim liquidator pending the hearing of the winding up petition. The appointment of an interim liquidator of the company at the same time that the receivers and managers have been appointed by the debenture holders is not unknown in law. **In Re Alvik Prestige Ltd (formerly known as Alvik Kenya Ltd) [2006] eKLR** Emukule J observed that it would not be inconsistent with the powers of the court in exercise of its jurisdiction as a companies court to appoint a liquidator in circumstances where a debenture holder has also appointed a receiver. He however recommended that where possible, the receiver and the liquidator should be one and the same person.

A second aspect of the applicant's application which persuaded this court regards the supervisory powers of this court when assets of a company that is subject to receivership are concerned. More often than not, it has been a uniquely Kenyan experience that receivers and managers of companies placed under receivership have dealt with the property of such companies without due regard to securing the best interest of both the secured and unsecured creditors. Receivers and managers in such instances have acted as if the unsecured creditors have no rights worth protecting. In serving the interest of debenture holders, the receivers and managers have sold the property of companies under receivership without regard to the principle of transparency and accountability that they are required to secure the best possible price for the assets and property sold of such company. I have not seen any legal bar to receivers and managers to be made accountable in similar fashion to auctioneers and chargees by requiring them to undertake valuation of assets of such a company to determine its market value and forced value prior to the said assets being sold. There is no legal reason why receivers and managers should not be required to undertake due diligence with a view to obtaining the best possible price for such assets of the company.

In fact, as has been observed by one of the local commentators, receivers and managers in Kenya have acquired a reputation as undertakers of companies; their work, it seems is to ensure that the companies placed under receivership are put on their death bed through the fastest possible route with no possibility of revival. I am not saying that the receivers and managers in respect of the company that is the subject of these proceedings are of that ilk or caliber. However, in the present application, the applicant made just case for the appointment of an interim liquidator pending the hearing of winding up proceedings. The appointment of an interim liquidator of the company will not interfere or affect the powers enjoyed by the receivers and managers pursuant to the debentures. They will continue managing the assets and property of the company that are charged to the debenture holders pursuant to the debentures.

As regard the respondent's application seeking either to stay or to strike out the petition, this court is of the opinion that the application has been prematurely made. In any event, it is doubtful whether the receivers and managers of the company can legitimately oppose an application seeking to wind up a company by reason that the company has been unable to pay its debtors. As stated earlier in this ruling,

the powers of the receivers and managers of the company are secured and protected by the debentures and the law providing for the rights of debenture holders in regard to the charged assets and property of the company. The receivers and managers can only participate in the winding up proceedings to secure the rights of debenture holders and not to oppose or urge a case at large on behalf of the company in favour or in opposition to a winding up petition. The respondent shall be at liberty to urge its application for staying or striking out the proceedings herein at the appropriate time. At this stage of the proceedings, this court declines to consider the merits of the application in light of the decision that has been made above.

In the premises therefore, I will allow the applicants application dated 16th June 2009. Ponangipalli Venkata Ramana Rao is appointed the interim liquidator of the company pursuant to provisions of **Section 235(1) of the Companies Act**. The interim liquidator shall be answerable to the court and shall file periodic reports, at the beginning monthly reports, until further orders of the court. The interim liquidator's powers shall be limited and restricted to the following acts; tracing, taking possession of, collecting, recovering and protecting the assets of the company pending further orders of the court. The interim liquidator shall have power to appoint an advocate to assist him in the performance of his duties and to bring or defend any legal proceedings in the name and on behalf of the company.

The interim liquidator's duties shall not extend to administering the assets and property secured by the debentures upon which the receivers and managers herein were appointed. So that there may be no conflict between the receivers and managers and the interim liquidator, the two sets of officials are directed to convene a meeting as soon as possible for purposes of ascertaining the assets and properties of the company that are subject to the debentures. The receivers and managers are directed to cooperate with the interim liquidator in this regard. For avoidance of doubt, the interim liquidator shall not have power to manage or inquire into the assets of the company that is established to be subject of the debentures. Nor will he have any powers to deal with the properties or assets of the company that have been taken possession of by the receivers and managers. The receivers and managers will be required to notify the court any compromise that they may reach with the directors of the company in respect of any settlement of their debt. The winding up proceedings herein are stayed in the interim pending further orders of the court.

The remuneration of the interim liquidator shall be paid, in the first instance by the applicant, and thereafter from the assets of the company that will be recovered that is not secured nor charged to the debenture. Each party shall be at liberty to apply. There shall be no orders as to the costs.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2009

L. KIMARU

JUDGE