



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**WINDING UP CAUSE NO. 7 OF 2013**

**IN THE MATTER OF**

**MUGOYA CONSTRUCTION & ENGINEERING COMPANY LIMITED**

**And**

**IN THE MATTER OF COMPANIES ACT, CAP 486 LAWS OF KENYA**

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**JUDGEMENT**

**Winding up of company**

[1] Before me is a Petition to wind-up a company dated 16<sup>th</sup> April 2013. But, the company also filed two applications; (1) a Motion dated 19<sup>th</sup> February 2015 seeking the court to strike out the Petition; and (2) a Motion dated 11<sup>th</sup> December, 2014 seeking stay of execution pending the hearing and the determination of the application for striking out the Petition.. These matters are just different sides of the same coin and I shall handle them together. The arguments used in support of the two applications relate to pendency of this winding-up Petition. Accordingly, and I stated this already, these interventions are capable of being conveniently determined together.

[2] Arising out of the petition and the applications mentioned above, I see the following two issues for determination, namely:-

- i. **Whether the Petition should be struck out entirely;**
- ii. **Whether this Honourable Court should issue a winding up order against the Company.**

[2] I choose to determine the application for stay of execution and striking out first for good reason and order.

**Striking out**

[3] The basis for applying that this Petition be struck out is that, pending the hearing and determination of the Petition, the Petitioner through the agency of Upstate Kenya Auctioneers obtained orders to execute warrants of attachment against the movable assets of the Company and proclaimed the said assets in execution of the decree of the Court issued on 14<sup>th</sup> June, 2012

against the Company. According to the company, the substratum of this Petition arises from the said decree issued on 14<sup>th</sup> June, 2012 in **High Court Misc. Application No. 624 of 2009 – Gichuki King'ara & Co. Advocates vs. Mugoya Construction & Engineering Company Limited**. Therefore, the company held the view that the Petitioner's simultaneous act of taking active steps to enforce the said decree and prosecuting the Petition herein was not a legitimate use of the process of the court and thus amounted to an abuse of the court process. On that basis, they appealed to the Court's inherent jurisdiction to prevent abuse of its process by the Petitioner. They cited the definition by Ringera J (as he then was) of abuse of court process in the case of **Microsoft Corporation vs. Mitsumi Computer Garage Ltd** (2001) 1 EA 127, at 136 to be;

**'However it must be remembered that the legal process like any other human machinery in other spheres of life is susceptible to abuse by man. I think Haynes P of the Court of Appeal of Grenada put the matter succinctly in the case of Mitchell and Others v Director of Public Prosecutions (1987) Law Reports of the Commonwealth, 127 at 129 when he said:**

**'In a civilized society legal process is the machinery used in the courts of law to vindicate a man's right or to enforce his duties. It can be used properly. It can be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose and used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of that process.' (Emphasis added)**

[4] The company also cited the case of **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000**, which stated thus:

**"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove *inter alia*, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment"**.

[5] To the company, in seeking execution pending the hearing and determination of this winding up cause, the Petitioner actively abandoned the **Winding-Up Cause No. 7 of 2013**. The company further argued that the said action by the Petitioner shows that this Petition was presented for another purpose *inter alia* to put pressure on the Company. In view of that fact, they submitted that the Petition should be struck out for being an abuse of the court process. See the case of **Matic General Contractors Limited vs. The Kenya Power and Lighting Company Limited (2001) LLR 4837 (CAK)** where the court held that;

**‘It is thoroughly settled now that, on a petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Acts to be made the vehicle of oppression.’**

[6] The other reason why the company wants the Petition struck out is that the Petition was filed during the pendency of the company’s Chamber Summons application dated 30<sup>th</sup> April, 2010 in which it opposed the decision of the taxing master. In light thereof, the company urged that the alleged debt was disputed. Again, the company saw support in the fact that the entry of judgment by Musinga J (as he then was) was made subsequent to the Company highlighting its submissions in support of its application for setting aside the taxing master’s decision. They relied on the decision by the Court of Appeal in **Brahmbhatt vs. Dynamics Engineering Ltd(1986) KLR 133** which held that;

**‘In an application to strike out a winding up petition, the court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail.’**

[7] The company posits that, since the debt is disputed, this petition should be struck out. The company contended that their objection to the decision of the taxing master is on major grounds such as; the propriety of the taxation; abuse of discretion by the taxing master; breach of rules of natural justice – *Audi alteram partem* by the taxing master; and breach of the Company’s legitimate expectation by the taxing master. See the case of **Mann vs. Goldstein (1968) 2 ALL ER 769** Ungood-Thomas J stated at page 775;

**‘For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor’s petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. This seems to me to be in accordance with the statement of Kekewich J ((1894), 70 LT at p 272), which I have quoted, even though it be borne in mind that the company in that case was solvent: and the references to irreparable damage in the other cases which I have mentioned, where the petitioners were contributories or creditors petitioning against solvent companies, do not exclude an injunction being granted to prevent an abuse of the process of the court. Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of this court’s jurisdiction to restrain the presentation of a winding-up petition.(Emphasis added)**

[8] They also cited the Court of Appeal for Eastern Africa in the case of **Cruisair Limited vs. CMC Aviation Limited (No. 2) (1976-80) KLR 874** which quoted the following statement from Buckley on the Companies Acts (11<sup>th</sup> Ed) pages 356, 357 that:

**‘A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the Company. A petition presented ostensibly for a winding up order but really to exercise pressure will be dismissed and under circumstances may be stigmatized as a scandalous abuse of the process of the court.’**

[9] The company concluded on this submission by stating that there is substantial ground to

dispute the alleged debt. And in accordance with **Re Welsh Brick Industries Limited (1946) ALL ER 197** in considering what constituted substantial ground, there being a fair probability that the company has a bona fide defence which would entitle it to an unconditional leave to defend a claim in the ordinary court is not enough.

[10] The company also submitted that it filed a notice of appeal on the decision by Justice Havelock which declined to review the decision of Justice Musinga. They asserted that the grounds of dispute are not based on frivolous grounds. They relied on the case of **Re African Safari Club Limited (2006) eKLR** which quoted with approval the holding in **Re London and Paris Banking Corporation, Equity cases 444** where Sir G. Jessel MR stated that;

**‘It is not sufficient for a company to say ‘we dispute the debt’; they must show some reasonable ground for doing so.’**

[11] The submission by the Company was that it genuinely disputes the alleged debt as contained in the statutory demand and the same doesn't amount to neglect to comply with statutory demand as pointed out by **Halsbury's Laws of England Fourth Edition 1996 Reissue at paragraph 2206**. On those grounds they believe that the Petition should be struck out.

### **Stay of execution**

[12] The company urged the court to stay execution which the Petitioner commenced against the company during the pendency of these winding-up proceedings. They relied on annexure marked as JAM – 1 at pages 1 to 7; and JAM – 2 at pages 16 to 20 of the Supporting Affidavit of James Mugoya Isabirye to show there has been attachment of company assets. They based their request upon section 225 of the Companies Act, Chapter 486 of the Laws of Kenya ('the Act') which they submitted voids any attachment or execution against the estate or effects of the company after commencement of the winding up by court in the following mandatory terms;

**Where any company is being wound up by the court, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void.**

[13] They averred that Section 226(2) of the Act defines the time of commencement of winding up as follows:

**In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.**

[14] And the Court of Appeal in **Receiver and Provisional Liquidator Nyayo Bus Service Corporatin vs. Firestone E.A (1969) Limited (1999) eKLR** held as follows;

**In this particular case the winding up of the corporation is deemed to have commenced at the time of presentment of the petition for the winding up, that is to say 25<sup>th</sup> February, 1997. See section 226(2) of the Act. Section 225 of the Act provides in no uncertain terms that any attachment after commencement of the winding up ‘shall be void’**

The court concluded as follows;

**Our conclusion is that the attachment of the appellant's goods was void and that the warrants of attachment were issued in error and should be set aside and that the respondents must bear the costs of attachment (execution)**

[15] Based on the law and judicial decisions, the company was of the view that the attachment was unlawful and should be stayed.

[16] The Petitioner argued that Section 225 of the Companies Act is inapplicable in this case as no winding up order has been made. Thus, the company cannot be deemed as 'being wound up by the court' as this honorable court is yet to make that decision. They argued further that the legislative intent of parliament was not to automatically void or stay any executions against a company upon the filing of a winding up petition. They faulted the interpretations of the said section as advocated by the company as that would mean that any debtor faced with executions would only need to procure third parties to file winding up petitions in order to pre-empt any further execution. To the Petitioner, the mischief sought to be cured by Parliament was to protect creditors by preventing situations where the debtor's properties are dissipated through collusion of the debtor and third parties and/or some creditors at the detriment of the/other creditors once the winding up process is underway.

[17] In addition, the Petitioner contended that section 223 clothes this court with discretion to order stay which should be exercised in favor of the Petitioner given the conduct of the company herein. The applicant was ordered by Justice Musinga on 14<sup>th</sup> June 2012 to deposit a sum of Kshs. 30,000,000 within 7 days failing which the orders of stay granted would lapse. The applicant ignored the court order. Consequently, they are of the view that the application for stay is *res judicata*. The decree was issued on or about June 2012, but the company has made it difficult for the judgement creditor to realize the fruits of its litigation due to various obstacles placed by the company on his way by the several frivolous applications the company has filed in court. The Petitioner averred that the company is merely buying time as it is actively transferring its assets to Uganda and/or hiding the same under shell corporations. Therefore, this matter should be brought to a rest by reiterating the order of Musinga J.

#### **DETERMINATION ON STAY OF EXECUTION AND STRIKING OUT OF PETITION**

[18] The major reason for applying that the Petition should be struck out is that there has been execution by way of attachment of the company's assets during the pendency of the Petition herein. This is the same reason for the company's application for stay of execution and attachment of their assets which had been undertaken while this matter is being considered by the court. My view is that when the court is faced with such applications, it must fashion a remedy that is appropriate; one that does not give one party undue advantage. I will fall back to the law on striking out of winding-up Petitions which is as stringent as in other cases of striking out pleadings. The position is as adumbrated in the decision by the Court of Appeal in **Brahmbhatt vs. Dynamics Engineering Ltd(1986) KLR 133** which held that;

**'In an application to strike out a winding up petition, the court should consider whether on the evidence it is a plain and obvious case for striking out and whether the petition was bound to fail.'**

[19] In the circumstances of this case, rather than striking out the Petition, the appropriate remedy for the company is found in section 225 of the Companies Act. Accordingly, the execution by way of attachment of company's assets is lifted as it was undertaken during the pendency of the winding-up proceedings by the court. I, must however admit that the argument by the Petitioner that the court must examine all circumstances of the case to ensure that section 225 of the Companies Act is not used fraudulently to prevent execution against a company has merit. I should say here that, where it is shown that a petition was filed to aid fraudulent schemes by the company or its directors or other third parties, such petition shall be struck down by the court without any mercy as a way of exorcising such demented action by parties and which shall also be a stealth abuse of the process of the court. But, this petition was filed by the judgment-creditor and he has not claimed that it was filed for ulterior purposes. In sum, as I have already provided for appropriate remedy to the company, I do not think, by looking at the material before the court **this is a plain and obvious case for striking out**. As such, I decline the application to strike out the petition. I have resolved issue 1. I will now proceed to determine the substantive issue on whether the court should issue a winding-up order in the petition.

## PETITIONER'S CASE ON WINDING-UP PETITION

[20] This Petition is dated 16<sup>th</sup> April 2013. The Petitioner is Peter Gichuki King'ara and he sought a winding up order against Mugoya Construction and Engineering Company Limited, (the Company) on account of its insolvency and inability to pay its debts. The basis of the petition is a debt of Kshs 35,479,350.55 plus interest, arising out of an advocate client bill of costs in High Court Miscellaneous Application No 624 of 2009 between the Petitioner as advocate and Mugoya construction limited as the client. The company was duly served with the petition and accordingly instructed the firm of Ochieng, Onyango, Kibet and Ohaga to enter appearance on its behalf on 3rd May 2013. According to the submissions of the Petitioner, the Company filed a Replying Affidavit in opposition to the petition. However, the affidavit did not challenge existence of the debt.

[21] The Petitioner testified on 14<sup>th</sup> November 2014. He stated that his firm of advocates was instructed by the company to act on its behalf on a project worth Kshs. 13, 608,000,000. The company then failed to pay his fees on professional services rendered to the company and he was forced to tax his bill of costs. he was awarded fees of Kshs. 29,497,765.05 in NBI HC MIC APP NO 624 OF 2009. Subsequently, Musinga J (as he then was) entered judgment in favour of the Petitioner and against the company upon the Certificate of Costs issued by the Taxing Master. A decree was drawn on the judgment for the sum of Kshs. 35,479,350.55. The Petitioner made demand and issued the statutory notice under section 120 for the said decretal sum from the company but in vain. The company applied for review of the judgment by Musinga J (as he then was) but the application was dismissed. The decree remains unsettled and it has not been stayed until now. The company is unable to pay its debts in the sense of section 220 of the Companies Act and it should be wound up. The company has filed documents relating to the debt which the Petitioner relied upon. The Petitioner prayed for a winding-up order to issue.

[22] The Petitioner also filed submissions to the effect that he produced all the relevant documents relating to the Petition but the Respondents declined to cross examine him. the issue therefore is:-

### a) **Whether petition meets the standards for winding up the company?**

[23] The Petitioner submitted that the Court of Appeal in the case of INTONA RANCH LTD V O'BRIEN [1992] KLR 149 stated that;

“It is settled law that the winding up order is not automatic. There must be proof of insolvency and /or inability on the part of the Company to pay its debts.”

Thus, the Petitioner must show that the company is insolvent and it is unable to pay its debts before any order to wind up the company is made. he urged that, in determining whether a company is unable to pay its debts, Kimaru JinRe Azetiland Consultants Limited, Nairobi winding up cause no. 14 of 2007, [2009] eKLR, held that;

“Under Section 220(a) of the Companies Act, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do. In my view, all that is required of a Petitioner under this section is to establish that the company is unable to pay a debt that is legitimately due from it. It will not do if the debt is disputed.”

[24] The Petitioner cited section 220(a) of the Companies Act which provides that;

“A company shall be deemed to be unable to pay its debts— 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 his 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.”

[25] According to the Petitioner, he served upon the company as well as its advocates on record in Civil Case 624 of 2009, the statutory three (3) weeks demand notice for payment of the debt. However, despite being served, the company neglected or refused to pay the debt or provide a good reason why it has failed to do so, it must therefore be deemed to be unable to pay its debts. Conviction in the company's insolvency is further built by the fact that the company last filed its annual returns in March of 2008. Therefore for all purposes it seems to have ceased trading despite keeping an office at Prudential Building, Wabera Street, Nairobi. The Petitioner argued that he has adequately shown that the company is no longer solvent or capable of paying its debts and it is only just and equitable that Mugoya Construction and Engineering company be wound up. They relied on the authorities they filed in court and are part of record.

#### THE COMPANY'S CASE

[26] The Company filed an affidavit in opposition of the Petition sworn on 7<sup>th</sup> November 2014 by James Abiam Mugoya Isabirye, the Managing Director of the Company. He averred that he is aware that a bill of costs by the Petitioner was taxed at Kshs. 29,497,765.55 on 18.1.2010 and a Certificate of Taxation issued thereto on 4.4.2012. The Company, however, on 29<sup>th</sup> January 2010, filed an objection to the decision by the Taxing Master and requested for reasons for the decision. The Taxing Master informed the company's advocates that the reasons are contained in the decision. Subsequently, the Company filed a Reference in the High Court vide Chamber Summons dated 30<sup>th</sup> April 2010. Pending the finalization of the Reference, the Petitioner applied for and judgment on the Certificate of Costs was accordingly entered into. The Petition is grounded upon the said judgment. Later, the Company applied for review of the entry of the decision but was refused by the court. The Company preferred an appeal and applied for copies of proceedings. He deposed that the appeal is arguable. The appeal will be rendered nugatory in the event it is wound-up. He beseeched the court to make appropriate orders other than winding up the company.

[27] The Company submitted that winding up a company is a draconian step which as the Retired Justice Kwach in **Matic General Contractors Limited (Supra)** said amounts to 'corporate execution'. See also the case of **Kenya Power and Lighting Company Limited vs. National Cereals & Produce Board (2002) 1 KLR 652**, Ringera J (as he then was) likened it to 'passing a death sentence on an individual.' Therefore, as the Company has initiated steps to challenge the decision which is the substratum of the Petition herein in the Court of Appeal; the Company should not be wound-up. They stated that they recognize that section 220(a) of the Companies Act gives the Court wide powers on hearing petition as hereunder;

**On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.**

They asserted that the discretion of this Court is wide on hearing the petition, and in view of the fact that the debt subject matter of the Petition herein arose from entry of judgment of this Honourable Court before finally determining the reference filed by the Company challenging the decision of the taxing master. The Reference has not been finally determined by the Court on its merits. Also, the Company has expressed its intention to challenge the decision declining review of the order of the Honourable Court in the Court of Appeal with the sole purpose of setting aside the said decision and having its reference challenging the decision of the taxing master finally heard and determined on merits. On those reasons, the company takes the view that a winding up order would cause irreparable harm to the Company whilst it has substantive grounds to challenge the decision of the Court in the Court of Appeal regarding the debt subject matter of the petition

herein. See **Re Euro Hotel (Belgravia) (1975) 3 All ER 1075**, where the Court quoted the holding in **Re Wools (LHF) (1969) 3 ALL ER 882** where it was stated thus;

**The bank's judgment debt, taken by itself, entitled the bank ex debito justitiae to a winding-up order: but the existence of across-claim made the matter one for the judge's discretion. A disputed debt will not support a winding-up petition, and whether an undisputed debt that is overtopped by a disputed cross-debt will support a petition is for the exercise of a judicial discretion. In the event, the Court of Appeal reviewed the grounds on which the judge had exercised his discretion in making a winding-up order, and reached the conclusion that there were sufficient grounds for interfering with his exercise of discretion. The Court of Appeal accordingly allowed the appeal and set aside the winding-up order.**

[28] In light of the above, the Company urged the Court ought not to issue a winding up order, but make any other order as it deems fit.

### **DEW SECURITY SERVICES LTD.'S CASE**

[29] Dew Security Services Ltd filed an affidavit in support of the Petition sworn by Dominic N. Wambua who is its Managing Director. He averred:-

- a) That all efforts were made to execute the decree herein but in vain as the company hid its attachable assets;
- b) That on 1.8.2012, the MD of the Company was ordered to by the Court to produce to court all books of accounts, titles, logbooks, minute books, bank statements and explain to court the disappearance of Kshs. 342,000,000 paid to the company by N.S.S.F on 3.2.12 but to date neither the said documents have been produced nor explanations given by the company. However, those proceedings were stayed under section 225.
- c) That the winding up order is deserved for them to realize their debt of Kshs. 14,081,021.42.

### **DETERMINATION ON PETITION**

[30] I have considered all the evidence presented in court as well as the affidavits and submissions of parties. The best argument presented by the company is that the debt herein is disputed on real and substantial grounds and so a petition cannot be founded on such debt. The Petitioner argued that he is a holder of a valid judgment of the court which has not been set aside. My view is that the Petitioner is a holder of a judgement and decree of the court. The said judgment and decree has not been set aside, reviewed by this court or overturned by a higher court. The said judgment and decree are sufficient for all purposes and intents to and constitute a valid debt on which a petition for winding up can be founded. It is worthy of note that pendency of appeal or reference does not affect the above stated position. From the documents provided and the testimony of the Petitioner, the Petitioner has proved that the company owes him a debt in the decretal sum stated herein which the company has not paid despite service of the requisite demand and statutory notice under section 202 of the Companies Act. The period of three weeks prescribed for payment after demand was made has long ago expired. And, in view of the position I have stated above, there is no satisfactory explanation of the failure to pay that has been offered by the company. Accordingly, under section 220 of the Companies Act, the company is deemed to be unable to pay its debts. See section 220(a) of the Companies Act which provides that;

“A company shall be deemed to be unable to pay its debts— 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 his 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.”

[31] Similarly, Kimaru J in Re Azetiland Consultants Limited, Nairobi winding up cause no. 14 of 2007, [2009] eKLR, minced no words indetermining whether a company is unable to pay its debts, when he held that;

“Under Section 220(a) of the Companies Act, a company shall be deemed to be unable to pay its debt if a demand is made to the company to pay the sum due within three weeks and the company fails to do so or offers unsatisfactory explanation of its failure so to do. In my view, all that is required of a Petitioner under this section is to establish that the company is unable to pay a debt that is legitimately due from it. It will not do if the debt is disputed.”

[31] There are also disturbing events in this case. The MD of the company herein has been accused of transferring company assets to destinations which are beyond the jurisdiction of this court. In other instances, the company has been accused of hiding its attachable assets, refused to furnish security or produce books of accounts or provide explanations regarding its assets or money allegedly received from NSSF; all was in vain. The Petitioner stated that the company has engaged in delaying tactics by filing numerous applications to buy time to dissipate its assets in Kenya. These arguments were not controverted and are not hollow. There is a sense in which some impropriety may not be ruled out completely. The debt owed to Dew Security has not also been denied at all and no serious averment was put forward to deny the said debt.

[32] Whereas, I am aware that winding-up is a draconian step to take. But, in the circumstances of this case, with a lot of trepidation, the court will be forced to draw “the sword of the Damocles” upon the company as a matter of justice to the parties herein. Therefore, the only appropriate order is: I make a receiving order against the company. Accordingly the company shall be wound up in accordance with the law. For avoidance of doubt, and for purposes of section 230 of the Companies Act, the “Official Receiver” herein is the “Official Receiver” attached to the court for bankruptcy purposes. It is so ordered.

**Dated, signed and delivered in court at Nairobi this 26<sup>th</sup> day of August 2015.**

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**F. GIKONYO**

**JUDGE**