**Re Ghelani Impex Ltd**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 29 November 1974

**Case Number:** 3/1974 (17/75)

**Before:** Madan J

**Sourced by:** LawAfrica

*[1] Company – Winding-up – Debt – No debt due on a foreign arbitration award until sued on or leave*

*given for enforcement – Arbitration Act* (*Cap.* 49), *s.* 27 (*K*.).

**JUDGMENT**

**Madan J:** This is a petition for winding up order against the named company on the ground that the company is unable to pay its debts. In addition to the petitioning creditor, another creditor of the company is represented in these proceedings in support of the petition for a winding up order. The company, under two agreements entered into with the petitioning creditor, undertook the sale and delivery of a certain quantity of cotton seed cake expellers to the petitioning creditor at an agreed price. The two agreements provided that any disputes arising out of or under the same were to be settled by arbitration in London in accordance with the Arbitration Rules of the Grain and Feed Trade Association Ltd. The company having failed to perform its obligations in full under the agreements the matter was referred to two arbitrators who were appointed jointly to determine whether the company had committed breaches of the same, and, if so, to ascertain the quantum of damages payable to the petitioning creditor. The arbitrators made five awards, giving the petitioning creditor a total of sterling £38,456, or, when converted, Shs. 666,996/85. The company’s appeals against two of the awards were dismissed. The petition states that now there are no proceedings pending in England for contesting any of the awards which have all become final. Demands have been made upon the company for the payment of its debts but unsuccessfully. A notice informing the company of intention to petition the court for a winding up order unless payment was made or secured or compounded within the next three weeks in which event the company would be deemed to be unable to pay its debts, also went unheeded. An affidavit sworn by a director of the company points out that the alleged debt is also the subject matter of five suits in the High Court in Kenya in which the petitioning creditor is seeking leave of the court to enforce the awards upon which the alleged debts are based and to have judgment entered in favour of the petitioning creditor. The affidavit continues that the company has disputed the debt and the five suits are still pending; that in view of the premises this petition is misconceived and it ought to be dismissed: or, in the alternative, stood over pending determination of the five suits. S.219 (*e*) of the Companies Act provides that a company may be wound up if the company is unable to pay its debts. The short question is whether there is a debt payable by the company to the petitioning creditor in Kenya upon which the petitioning creditor can base this petition. The awards referred to are foreign awards to which Part III of the Arbitration Act (Cap. 49), applies by virtue of definition of foreign award in s. 2 of that Act. S.32 (1) of the same Act provides that subject to Part III a foreign award is enforceable in Kenya either by action or in the same manner as the award of an arbitrator is enforceable under s. 27. The court has been told that no action has been filed by the petitioning creditor to enforce the awards as such. S.27 provides that an award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a decree or order to the same effect, and where leave is given, judgment shall be entered in terms of the award together with costs of the application. It is clear that even a local award may not be enforced without leave of the High Court. How is it then possible to enforce a foreign award without such leave? Until such leave is given by the High Court there is merely a right to apply for it, save that a foreign award may also be enforced by action. With respect, Mr. Esmail for the petitioning creditor was wrong when he said no leave is necessary under s. 27. He was, however, right in his submission that there is no distinction between a local and foreign award provided the conditions for enforcement are satisfied, and the procedure selected is under s. 27. The most important, in fact the indispensable, condition is to obtain leave of the High Court to enforce the award. Mr. Esmail has also argued that quite apart from the statutory provisions for the enforcement of an award, there is a right at common law to claim payment of a debt due, and the company is indebted to the petitioning creditor in Kenya quite apart from anywhere else. Mr. Esmail also said that the remedy at common law is concurrent with the statutory remedy. In my opinion no such remedy is available at common law in Kenya in respect of a foreign award unless it has been crystallised into a debt either by action or it becomes enforceable by leave of the High Court under s. 27. No remedy therefore is available at common law to enforce a foreign award in Kenya. In this respect, the provisions of s. 36 (*a*) of the Arbitration Act are also of no avail because the same statute itself provides a method of enforcement of an award to the exclusion of any other remedy. The petitioning creditor has not followed the prescribed procedure. There-fore, so far, there is no debt payable by the company to the petitioning creditor in Kenya. Mr. Lakha, relying upon the judgment of Kerr, J. in *Dalmia Cement Ltd. v. National Bank of Pakistan*, [1974] 3 W.L.R. 138, submitted that there is a lacuna in the law because there is no reciprocal legislation to enforce in Kenya an award delivered in a foreign country as in this case. If Mr. Lakha would care to read the learned judgment of Law, J.A., in the Court of Appeal in *Kassamali Gulamhussein & Co. v. Kyrtatas Bros*., [1968] E.A. 542, his discomfiture and any doubts that assail him will be set at rest. He will also find the relevant protocol set out in the first schedule to Arbitration Act, which has been made applicable in Kenya. In modern times, and at the stage of development of jurisprudence we have reached, this petition provides an irrefutable example of heartrending frustration felt sometimes over difficulties arising from legal technicalities. But that is the way the law is written. Helpless, I must administer the law the way it is written. This petition was quite unnecessary, especially in view of the five suits filed before it by the petitioning creditor in respect of the same awards. I think it was intended to pressurise the company into submission. The court will not tolerate nor sanction a double attack of this kind. The petition is therefore dismissed with costs.

*Order accordingly.*

For the petitioner:

*A Esmail* (instructed by *Esmail & Esmail*, Nairobi)

For the company:

*AA Lakha*