



**Katco Investment Limited v Kenyon Limited (Insolvency Cause E019 of 2020)
[2024] KEHC 10174 (KLR) (Commercial and Tax) (16 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10174 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E019 OF 2020
A MABEYA, J
AUGUST 16, 2024
IN THE MATTER OF KENYON LIMITED UNDER LIQUIDATION**

BETWEEN

KATCO INVESTMENT LIMITED APPLICANT

AND

KENYON LIMITED (UNDER LIQUIDATION) RESPONDENT

RULING

1. Before Court is an application dated 14/12/2023. It was brought under Article 159 of the *constitution of Kenya*, 2010 section 5 of the *Judicature Act*, sections 1A, 1B, 3,3A of the *Civil Procedure Act*, Order 22 rule 35, 51 rule 1 of the *civil procedure rules*, section 1002 of the *Companies Act*, section 398(4), 403, 462, 466, 503, 504 of the *Insolvency Act*, rule 10 of the *Insolvency regulations*.
2. It sought that the liquidator of the company, Peter Kahi, be cited for contempt of court; for failing to comply with the orders issued on 14/10/2022. That a declaration be issued stating that the Liquidator and the directors were in breach of their duties contrary to Part VI of the *Insolvency Act* (“the Act”).
3. The applicant further sought a declaration that the directors of the company were guilty of wrongful trading, that the Liquidator and the directors be found to be responsible for the rent arrears amounting to Kshs. 29,374,138.60 and leave be granted to execute the rental arrears against them.
4. The application was supported by the grounds set out on the face of it and the supporting affidavit of Shamji Keshra Jesani sworn on 23/1/2023. The applicant contended that the company had passed a special resolution for voluntary winding up. That the directors of the company had made a statutory declaration that the company was able to pay its debts within a year and the statements of accounts were produced. Based on those statements, the company had uncharged assets of Kshs. 27,836,420/- and the debts were Kshs. 20,475,308/-.



5. That vide an application dated 4/11/2021, the Liquidator had sought leave of Court to have the company's assets sold by way of public auction or private treaty. That in so doing, the company had admitted that it was unable to pay its debts thus the reason for the proposed sale.
6. It was therefore contended that the directors of the company were in breach of their fiduciary duties under section 504 of the Act for declaring that the company was solvent yet it was not. That the directors were fraudulently and wrongfully trading by conducting business in a way to defraud creditors.
7. That at the commencement of the liquidation, the rent arrears amounted to Kshs. 4,633,122/- but over the liquidation period, the same accumulated to Kshs. 29,374,138.60. According to the applicant, the liquidator's failure to take action, caused the increase in the debt and he denied the applicant an opportunity to mitigate its losses by taking possession of the premises. That the Court ordered the Liquidator to convene a creditors' meeting and produce updated accounts. That in contempt thereof, the liquidator produced a report which had inconsistencies and the figures therein could not be verified. That as a result, the applicant was at a risk of losing Kshs. 29,374,138.60 in rent arrears.
8. In opposition, the company filed a replying affidavit of Patrick Andrew Dean Ah-chuen, a director, sworn on 24/8/2023. He stated that at the time of voluntary liquidation, the company was able to pay its debt based on the assets available. He deposed that the rent owing at that time was Kshs. 4,647,077/- and there were funds to settle the account and he did not know why the same was not settled.
9. He observed that the applicant had filed a suit at the lower court and obtained orders for distress of rent but had not accounted for the goods taken amounting to Kshs. 17,928,509/-. That the applicant had always interfered with the liquidation process and the orders sought against the directors were misconceived.
10. The application was canvassed by way of written submissions which I have considered.
11. The applicant submitted that the Liquidator was guilty of malfeasance and breach of his duties under section 504(3) of the Act. That he had not taken any step towards liquidation of the company and any attempt to distress for rent was stopped. It was submitted that despite there being monies held in the bank accounts, the Liquidator failed to pay rent. That the Liquidator made irregular payments which had no explanation.
12. On whether the liquidator was in contempt of court, it was submitted that he had partially complied with the orders of this Court and had convened a creditors meeting. That the directors of the company ought to have made a full inquiry of the company's affairs and therefore the declaration of solvency was false. That in the premises, the directors were in breach of their duties as they had a fiduciary duty to the company's creditors.
13. The respondent submitted that the directors had not been running the company and therefore could not be held accountable for any acts performed during the liquidation period. That the applicant had failed to demonstrate any acts of misfeasance that had been done by the directors.
14. I have considered the pleadings and submissions and two issues arise for determination. The 1st issue is whether the Liquidator is in contempt of Court. The applicant submitted that the Liquidator had partially complied with the orders of 14/10/2022.



15. In *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* [2016] eKLR, the court held that: -

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- a. the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- b. the defendant had knowledge of or proper notice of the terms of the order;
- c. the defendant has acted in breach of the terms of the order; and
- d. the defendant’s conduct was deliberate.”

16. In the present case, on 14/10/2022 the Court directed the Liquidator to convene a creditors’ meeting and produce updated accounts of his acts and dealings with the company and full financial accounts from the date of liquidation. The Court further ordered that the Liquidator and the creditors do agree on the best mode of distribution of the company’s assets and have them sold within 21 days of the creditors’ meeting.

17. The evidence on record demonstrates that the Liquidator did convene a creditors’ meeting in compliance with that order. The company produced a document on the state of affairs of the company which shows the assets, liabilities in question. The applicant argued that the Liquidator ought to have given a more detailed report. A perusal of the statement of affairs shows that the Liquidator produced sketchy information though not as detailed as the applicant would have wanted them to be. In the premises, I find that the subject order had been complied with to some extent. There was no evidence of any further action undertaken by the Liquidator.

18. On the second issue, the applicant has taken issue with the conduct of the Liquidator and the directors stating that they were in breach of their fiduciary duties and guilty of wrongfully and fraudulently trading.

19. In this case, the Liquidator assumed office on 13/05/2021 when the company was placed under liquidation. During his one-year term, the Liquidator was obligated to conclude the liquidation process. However, not much was done. This prompted this Court to order him to convene a creditors’ meeting and come up with a way of disposing off the assets of the company to realize some money for the creditors.

20. At the time for voluntary liquidation, the directors stated on oath that the company was solvent and the assets of the company were sufficient to pay the creditors. However, this position turned to be incorrect as the liquidator told the Court in November, 2021 that the company was insolvent. The position worsened further as the rent of the premises had continued to rise to the detriment of the applicant as the landlord.

21. Regrettably, the Liquidator did not file any affidavit in response to this application. In the orders of 14/10/2022, the Court had directed that if the liquidator failed to complete the liquidation by selling the assets within 21 days of the creditor’s meeting, the Liquidator would automatically be removed. It is evident that the liability of the company clearly outstrips the assets.

22. The period of liquidation has clearly been detrimental to the company. The Liquidator carelessly handled the Liquidation as a result of which, there was accumulation of additional debt in excess of Kshs.25 million in rent arrears as at November, 2021 when the previous application for his removal



and leave to sell the assets of the company were made. There is no explanation why the liquidator was not paying the rent during the liquidation period thereby prejudicing the applicant further while the other creditor's losses remained static.

23. Liquidators have a duty to act in the best interest of the creditors and contributories generally and as such, they must exercise a high standard of care and skill. They must always act impartially and independently. They should not act carelessly or negligently to the detriment of the creditors. I dare state that, where such carelessness and/or negligence is proved, they should be held personally liable for such acts. Once liquidation commences, the same should be determined at the earliest in order to cut on costs including the Liquidator's own remuneration.

24. Where a party pleads malfeasance, the burden is upon him to prove it. This position was well set out by Lesley Anderson QC in the case of *Re Idessa (UK) Ltd* [2011] EWHC 804(Ch) wherein he stated thus: -

“I am satisfied that whether it is to be viewed strictly as a shifting of the evidential burden or simply an example of the well-settled principle that a fiduciary is obliged to account for his dealings with the trust estate... [counsel for the liquidator] is correct to say that once the liquidator proves the relevant payment has been made the evidential burden is on the Respondents to explain the transactions in question. Depending on the other evidence, it may be that the absence of a satisfactory explanation drives the Court to conclude that there was no proper justification for the payment. However, it seems to me to be a step too far [counsel for the liquidator] to say that, absent such an explanation, in all cases the default position is liability for the Respondent directors. In some cases, despite the absence of any adequate explanation, it may be clear from the other evidence that the payment was one which was made in good faith and for proper company purposes.”

25. In the present case, the Court has carried out an examination of the evidence on record in terms of section 504(6) of the *Act*. Although the directors had stated at the commencement of the liquidation, through the statement of affairs, that the company was solvent and could pay its debts, it is not clear at what point the company fell short of that fact. Could it be that the Liquidator squandered the monies of the company or its assets during the 2years of the liquidation process before 14/10/2022 when the court made certain directions? It is not clear. The Court agrees with the applicant that the information provided by both the directors and the Liquidator is not sufficient. What is clear is that, the directors were not candid in their statement of affairs and were in breach of their fiduciary duty to the company.

26. In its ruling of 14/10/2024, the Court had made a finding that the Liquidator was in breach of his duties under the *Act*. The Court has also found that the directors of the company may have not told the truth in their statement of affairs of the company at the time they resolved to enter into voluntary liquidation and were in breach of their fiduciary duty to the company.

27. The directors contended that at the time of commencement of liquidation, the assets of the company were valued at Kshs.27,836,420/- against liabilities of Kshs.20,475,308/-. There is nothing on record to prove that contention. As already stated, the Liquidator decided to give the application a wide berth.

28. I have already found that at the commencement of the voluntary liquidation, the rent arrears were said to have been Kshs.4,633,122/00. As at the November, 2021, it had skyrocketed to Kshs.29,394,138/60. The difference in the arrears was a cost incurred for the benefit of the liquidation that was sanctioned by the directors of the company. It was exacerbated by the total inaction of the Liquidator. As stated in the ruling of 14/10/2024, the Liquidator did absolutely nothing during the first one and a half years of the voluntary liquidation.



29. In the Malaysian case of *Bina Puri Sdn Bhd v. Jambuligan Setburaman-Raki C/O Rimbun Corporate Advisory Sdn Bh* (D7-28-895), the court held that where the liquidator failed to take reasonable steps to bring liquidation to an early conclusion, the creditors were entitled to bring an action against the liquidator.
30. In the South African case of *Standard Bank v. The Master of the High Court* (103/09) (2010) ZASCA 4, it was held that: -
- “In my view, like Caesar’s wife, liquidators should be beyond reproach. In this case, their counsel conceded before us that their conduct was not. It ought to have been, given the fiduciary position occupied by them. ... they failed in the discharge of a most rudimentary function for liquidators, namely the keeping of proper books of account. Given the obligation imposed on them to do so, that dereliction should not be countenanced ...”
31. In the present case, from the conduct of the directors and the Liquidator, the Court has no doubt that they were in breach of their duties under the *Act*. The Liquidator has failed to account for the period of more than 2 years he has sat on the liquidation. That, in the view of this Court, is a serious dereliction of duty. Though the *Act* specifies payment of fines, that is a tedious process considering that an Insolvency Court is not a Criminal Court.
32. To this Court’s mind, where there is outright negligence and serious dereliction of duty by a liquidator and the same leads to losses, that should entitle the creditors to sustain an action to recover the loss suffered rather than criminal sanction which would require the involvement of the Office of the Director of Public Prosecutions with the attendant difficulties in prosecution. That may be considered as an additional remedy to the hapless creditors.
33. The drafters of the *Insolvency Act* intended both administrations and liquidations under the *Act* to be undertaken swiftly, efficiently and expeditiously, within 12 months. That is why there is a requirement that after 12 months, an application for extension should be made to the Insolvency Court. It is expected that in such an application, the Administrator or the Liquidator, as the case may be, should explain to the Court the extent he has executed the Administration or Liquidation.
34. The tendency of Administrators and Liquidators taking eternity in executing their mandate while drawing remuneration from ailing or dying or insolvent companies must be discouraged strongly. It may in other cases, such as the present one, to further losses on the part of creditors which is not the objective of the Act.
35. Accordingly, the Court finds that the application is partially successful and makes the following orders: -
- a. The directors of the company and the Liquidator are in breach of their duties under Part VI of the *Insolvency Act*.
 - b. The directors of the company are guilty of fiduciary duty to the Company under section 504 of the *Insurance Act*. They are hereby found liable to contribute a sum of Kshs.15,000,000/- to the assets of the company.
 - c. The order of 14/10/2022 having been self-executing and the same having not been set aside or appealed against, the applicant is entitled to distress for rent arrears amounting to Kshs. 24,741,016/60 that was incurred after the voluntary liquidation commenced.
 - d. Costs of the application to the applicant in any event.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

