



REPUBLIC OF KENYA



KENYA LAW
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Mayfair Holdings Limited v DAS Group Kenya Limited (Insolvency Petition E006 of 2023) [2024] KEHC 10058 (KLR) (13 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
INSOLVENCY PETITION E006 OF 2023**

RE ABURILI, J

AUGUST 13, 2024

**IN THE MATTER OF THE COMPANIED ACT NO. 17 OF 20215 AS
READ TOGETHER WITH THE INSOLVENCY ACT NO. 18 OF 2015**

AND

IN THE MATTER OF WINDING UP OF DAS GROUP KENYA LIMITED

BETWEEN

MAYFAIR HOLDINGS LIMITED CREDITOR

AND

DAS GROUP KENYA LIMITED DEBTOR

JUDGMENT

1. Vide a Petition dated 4th October 2023 the Petitioner Mayfair Holdings Ltd hereinafter called the Creditor, petitioned this court against the Debtor Das Group Kenya Ltd, seeking the following orders:
 - a. That Das Group Kenya Ltd owes the Petitioner Kshs.847,175 or as the amount may be at the time of the conclusion of this petition;
 - b. That Das Group Kenya Ltd be ordered to pay an interest of (a) above (the owed sum) at 14% p.a rate from 21st August 2015 till payment in full.
 - c. That Das Group Kenya Ltd be liquidated by an order of this court and in accordance with the [Insolvency Act](#), 2015.
 - d. That this court appoints a receiver/statutory Manager who is an authorized insolvency practitioner to act as the provisional liquidator.



- e. That the costs of this petition and the petitioner's debt of a total amount of more than Kshs.847,175 together with interest and any further accrued amount be provided for from the assets of any of Das Group Kenya Ltd in priority to any other debtor.
 - f. That further interests on decrees issued continues to accrue from the date issued.
 - g. That this court do issue order stopping Das Group Kenya Ltd trading anywhere in the Republic of Kenya.
 - h. That the assets of all the shareholders and directors of Das Group Kenya Ltd using money appropriated by them be traced and reserved for sale by the liquidator to pay debts and this debt any dealing in them by sale, transfer, lease, mortgage or whatsoever stopped pending liquidation.
 - i. That Directors of Das Group Kenya Ltd (past and present) be barred by a court order from being directors of any other company in Kenya permanently by themselves or by proxy.
 - j. Such orders that this court may deem fit and just in the circumstances.
2. The Petition is supported by an affidavit sworn by Amin Gilani sworn on 4th October 2023, annexing documents which ae certificate of costs and application for execution of decree in Kisumu CMCC No. 162 OF 2013; Nairobi HC Misc. No. E1285 of 2020.
 3. In the Deposition, it is reiterated that the debtor company has several cases with the Petitioner, in which cases costs were assessed in favour of the Petitioner, and in the listed cases, the aggregate costs are Kshs.847,175 which continues to accrue.
 4. That the demands for settlement of the outstanding costs have not been honoured by the debtor company hence the petition for insolvency.
 5. The petition was argued orally on 13th June 2024 with Ms. Okaka submitting for the Petitioner whereas Mr. Mukuha argued for Mr. Bwire Advocate representing the debtor company.
 6. According to Ms. Okaka, there is no dispute that the debtor owes the sum contained in the petition for insolvency. She submitted that several demands for settlement had been made in vain, that the debts exceed Kshs.100,000, there is demand and execution attempts bore no fruits. That the debtor company had not demonstrated its ability to settle the debts which remain unsettled despite execution process.
 7. Opposing the insolvency petition, Mr. Mukuha submitted that the debtor company does not owe the Petitioner the sums claimed. That whereas it was admitted that in Kisumu CMCC No. 162 of 2013 the Petitioner was awarded costs of Kshs.484,000 whose costs did not earn interest.
 8. Further, that in Nairobi HC Misc. No. E1285 of 2020, the costs assessed are Kshs.163,175 but that no interest accrues on the costs as per the Ruling of 18th May 2022.
 9. The Debtor's counsel further submitted that the petition as drafted is defective as it offends Section 384 (1) of the [Insolvency Act](#), 2015 and Regulation 77 B made under the [Act](#) in 2018.
 10. That there is no statutory demand of 21 days issued before filing the petition; that the petition is not accompanied by a verifying affidavit, as per the Section 384 (1) and Regulation 77B which are couched in mandatory terms. It was submitted that the purpose of the statutory demand was to notify the debtor company of consequences of failure to settle the debt.
 11. In this petition, it was submitted that there was no such alleged statutory demand issued or served upon the debtor.



12. In addition, it was submitted that there was no evidence of an unsuccessful execution process for recovery of the costs awarded as there is no evidence of any warrants of attachment or proclamation done and returns on the same.
13. It was submitted that there was no evidence of inability of the debtor to settle the debts, there being no outcomes of execution processes.
14. On inability to settle the debts, the debtor's counsel submitted that the onus of proof lies on the creditor to satisfy the court on the value of assets of the debtor less liabilities. Counsel urged this court to disallow the petition with costs.
15. In a rejoinder, Ms. Okaka submitted that the debtor had not filed any response to the petition and that the submissions were a trial by ambush by the debtor.

Determination

16. I have considered the petition for insolvency of the debtor as filed and argued by both parties' counsel orally.
17. The main issue for determination is whether the Petitioner/Creditor has satisfied the conditions precedent as set out in the *Insolvency Act* and Regulations, for this court to grant the orders sought.
18. Sections 384 and 424(1) (e) provides for circumstances under which a company may be liquidated as follows.

“ 384. The circumstances in which a company is unable to pay its debts:

- i. For the purposes of this part, a company is unable to pay its debts
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 - a. If a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shilling or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for 21 days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;
 - b. If execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part;
 - c. If it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due.
- ii. A company is also unable to pay its debts for the purposes of this part if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).



iii. The *insolvency Regulations* may increase or reduce the amount specified in subsection (1) (a).”

19. Section 424 of the *Insolvency Act*, 2015 then provides for circumstances under which a company may be liquidated by the court as follows:
1. A company may be liquidated by the court if:
 - e. The company is unable to pay its debts.
20. Has the Petitioner satisfied the court the conditions set out in Section 384 and 424 of the *Insolvency Act*?
21. The Petitioner’s counsel submitted that the debtor owes more than Kshs.100,000 to the creditor; that despite demand, no settlement of the assessed costs had been made; that attempts to execute for recovery bore no fruits and that the debtor company was unable to pay its debts.
22. The Debtor company submitted challenging the amounts claimed and asserting that the issue of interest was incorrect as the assessed costs have no interest assigned to it; that no statutory demands were made; that no verifying affidavit was filed and that there was no evidence of any execution process as the applications for execution do not amount to failed execution. Finally, it was submitted in contention that there was no evidence that the debtor was unable to pay its debts since there is no evidence that its assets are less than its liabilities, present and future.
23. There is no dispute that the debtor owes the creditor/petitioner an amount in excess of Kshs.100,000 as shown by certificate of costs in Kisumu CMCC No. 162 of 2013 dated 4th February 2022 for Kshs.494,565 and a Ruling on taxation dated 18th May 2022 in Nairobi HC Misc. No. E1285 of 2020 for Kshs.163,175.
24. In the certificate of costs dated 4th February 2022, there is no indication that the taxed costs would attract interest at any rate stated by the Petitioner. No Judgment or Ruling awarding interest on costs was annexed to the supporting affidavit as sworn by Amin Gilani on 4th October 2023.
25. Additionally, in the Ruling on Taxation dated 18th May 2023, there is no indication that the costs taxed in Nairobi HC Misc. No. E1285 of 2020 would attract any interest. It follows that any claim that includes interest is fictitious and devoid of proof. In the same vein, the purported application for execution of decree annexed, which adds interest is null and void and is incapable of credibility.
26. Furthermore, as correctly submitted by the debtor’s counsel, an application for execution which does not reveal the outcome of that execution process by way of warrants of attachment, proclamation and whether any property of the debtor was found on attachment is no execution process. There is in other words, no evidence that there was execution and that execution was unsuccessful on account of the debtor having no attachable movable or even immovable property capable of being sold to settle the decree of the court by way of certificate of taxed costs. An application for execution of decree, which application is not filed into court is no application.
27. There is further no evidence that the debtor’s assets were identified to be much less than its liabilities as claimed by the creditor.
28. There is also no evidence that the creditor served the debtor with a statutory notice of the intention to petition for liquidation, prior to the filing of the petition herein. The onus of proof lies on the petitioner to prove that it did all the above and that in the end, the court can deduce that the debtor is unable to pay its debts.



29. On the question of there being no verifying affidavit, I find no merit in it as the supporting affidavit sworn on 4th October 2023 verifies the petition.
30. In the end, I find that the petition for insolvency of the debtor company does not satisfy the conditions precedent for this court to declare the debtor company insolvent.
31. Accordingly, the petition dated 4th October 2023 is found to be devoid of any merit and the same is hereby dismissed.
32. On costs, I observe that the debtor owes the petitioner costs assessed by courts of competent jurisdiction and it is its obligation to settle those costs. However, why would the debtor take the creditor with a court judgment round the circles instead of settling the debts.
33. Owing to the cyclonic conduct of the debtor, making the creditor bear barren decrees of the court and therefore delaying and denying justice, and causing it untold hardship as a mere pious explorer in the pursuit of justice, I find that the debtor/ Respondent is not deserving of costs of the dismissed petition.
34. I order that each party shall bear their own costs of the petition herein.
35. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF AUGUST, 2024

R. E. ABURILI

JUDGE

