



**Thuku v Atnlantis Finance Limited (Tax Appeal E007 of 2023)
[2024] KEHC 16833 (KLR) (Commercial and Tax) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16833 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
TAX APPEAL E007 OF 2023**

BM MUSYOKI, J

NOVEMBER 29, 2024

**N THE MATTER OF SECTIONS 384 (1), 423(1), 424 (1) (E) & 425 (B), 512,
513, 514 OF THE INSOLVENCY ACT**

AND

**IN THE MATTER OF REGULATION 77B OF THE INSOLVENCY
REGULATIONS 2016**

AND

IN THE MATTER OF ATLANTIS FINANCE LIMITED

BETWEEN

VINCENT WAWERU THUKU PETITIONER

AND

ATNLANTIS FINANCE LIMITED RESPONDENT

JUDGMENT

1. The petitioner brought these proceedings seeking the following orders as contained in his petition dated 1-02-2023;
 - a. The respondent be declared insolvent and liquidated under the provisions of the *Insolvency Act* No. 18 of 2015.
 - b. An Official Receiver be appointed by this Honourable Court as the liquidator.
 - c. The costs of this petition be granted to the Petitioner and be paid out of the assets of the Respondent on priority.



- d. The Honourable Court makes such order as may be necessary and just in the premises.
2. The petitioner pleaded that he entered into an agreement with the respondent on 13th February 2020 in which the petitioner lent the respondent a sum of Kshs 1,500,000.00 which sum was to attract interest at the rate of 2% per month and was payable in a period of twelve months. The respondent failed to pay and as a consequence, the amount grew to Kshs 2,241,495.91 as at 22nd June 2022. This failure to pay prompted the petitioner to issue a statutory demand on 31-10-2022 which notice did not attract any response or action from the respondent. The petitioner claimed that the respondent was unable to pay its debt and should therefore be liquidated.
 3. The respondent opposed the petition through a replying affidavit sworn on 10-05-2023 by Robert Ndwiga who described himself as the general manager of the respondent. The respondent admitted that the petitioner was one of its investors and admitted that he had loaned it Kshs 1,500,000.00 by agreement dated 15th February 2020. The respondent stated that the agreed interest was a flat rate of 2% per month. It acknowledged that it was unable to pay the debt because its debtors also defaulted which made it unable to meet its contractual obligations to the petitioner.
 4. The respondent has also averred that the unfavourable business environment which was caused by the break out of Covid-19 pandemic forced it to reduce interest yield from 2% to 1.5% of which it informed the petitioner by a letter dated 4-05-2020. The respondent admitted at paragraph 9 of its replying affidavit that it owed the petitioner a sum of Kshs 1,788,750.00 and not the amount claimed in the petition. According to the respondent, the calculations and tabulations by the petitioner were erroneous. The respondent added that it was ready to settle the debt and had engaged the petitioner with a view to settling the debt but the petitioner was adamant and has insisted in sustaining the petition. It added that it was able to pay its debt but for lack of cooperation from the petitioner. The respondent also alleged that it held security for some twelve properties which it was in the process of realising and it expected to settle the debt to the petitioner from the proceeds thereof. It exhibited the charges in respect of these securities as exhibit 'RN 3(a)' and 'RN 3(b)' which were duly registered and a letter dated 8th May 2023 asking whether the petitioner could agree to swapping the debt with the securities.
 5. The cause was heard by way of written submission. The petitioner in his submission dated 15th April 2024 has framed three issues for determination which are; whether the petitioner is a bona fide creditor within the law, whether the liquidation order sought in the petition should be granted and who should bear the costs of the petition which I think fairly cover the dispute in this matter.
 6. The petitioner has submitted that there is no substantial dispute on the debt and as such in the meaning of the law, he was a creditor. It is true as submitted by the petitioner that unless there is substantial dispute on the amount claimed by the creditor, the petitioner has locus to file for insolvency. The respondent has deponed and submitted that the interest charged and tabulated by the petitioner was not in tandem with what the parties agreed as it has been erroneously computed. I have read the agreement and I note that clause three of the same provides for a flat rate of 2% which was to run for a period of 365 days. It is not clear whether the same rate would have continued after the 365 years. If we were to go with the respondent's position, it would mean that the total amount repayable was Kshs1,860,000.00 and not Kshs 2,241,495.91 as claimed by the petitioner.
 7. According to the respondent, the true amount due is Kshs 1,788,750.00 and not 2,241,495.91 as demanded by the petitioner which means that there is a difference of Kshs 452,745.91 which needs to be proved. Is this amount substantial as compared to the debt demanded by the petitioner? A simple calculation would show that the amount in dispute is 20.2% of the amount claimed by the petitioner.



Although this amount may appear substantial as compared to the disputed claim, it has not escaped the eyes of this court that the respondent has not paid a cent of the undisputed sum. Not even the principal loan of Kshs 1,500,000.00 and in the circumstances, I find the respondent is raising the issue of interest rate to create an impression of a serious dispute. If the respondent had paid the principal loan or the admitted sum, this court would have no hesitation in finding a dispute in the amount claimed. I agree in holding in *Kitmin Holding Limited v Noble Resources Intranational Pte Limited* (2018) KEHV 6188 (KLR) thus;

“Under Section 424 (e) of the *Insolvency Act*, a Company may be placed under liquidation if it is unable to pay its debts. It is however the law that where the company demonstrates that there is a bona fide dispute to the debt, then Liquidation is not available. It would be an abuse of the Court process for a Petition for Liquidation is to be commenced against a Company on the ground of inability to pay its debts when it is based on a truly disputed debt. This proposition is old hat and was succinctly reiterated in the decision of *Re Lympne Investments Ltd* (1972) 2 All ER 385 where the court held;

“The Companies’ Court must not be used as a debt collecting agency, nor as a means of bringing improper pressure to bear on a Company. The effects on a Company of winding up Petition against it are such that it would be wrong to allow the machinery designed for such Petitions to be used as a means of resolving disputes which ought to be resolved in ordinary litigation, or to be kept in suspense over the company’s head while that litigation is fought’

However, the Company must show that the debt is disputed on substantial and bonafide grounds and the onus of discharging this is obviously on the Company (See *Re Ghelani Impex Ltd* (1975) EA 197). If this were not so, then a Company would seek to avoid the ramifications of Liquidation by simply stating that a debt is disputed.’

8. The respondent was served with a statutory demand which it did not respond to in time. The respondent’s attempts to extend time to file an application to set aside the statutory demand did not succeed as the same was dismissed by Justice F. Mugambi on 16th February 2024. In doing so, the Honourable Judge observed that the respondent had not demonstrated its financial solvency as it had not exhibited bank statements or financial reports. Even as at the time of hearing of the petition, there were no attempts to show that the respondent was liquid and capable of paying its debts. A mere existence of debt does not mean that a debtor is unable to pay its debts but where a statutory demand has been served and has not been satisfied and the debtor does not show an iota of financial probity, the court would be justified to infer that the debtor is unable to pay its debts. Actually, Section 384(1)(a) of the *Insolvency Act* Chapter 53 of the Laws of Kenya provides that failure to pay, secure or compound the debt within 21 days after the service of statutory notice, the company is considered to be unable to pay its debts and in my opinion, the onus of rebutting this position is on the debtor.
9. The purpose of insolvency proceedings is to secure payment of debts from unperforming persons while taking interest of all the persons and entities with a stake in the existence of the company including the owners, debtors and creditors and not to force payments of disputed debts. The respondent has averred that it is solvent and it is actually holding securities for its debtors for about 12 properties but it has not told this court how far it has gone in realising those properties or the current status of the debts. The respondent has not shown that it owns any property as those securities were as at the time they were exhibited, registered to one Edwin Njeru Gichovi.



10. It follows from what I have stated above that, the petitioner was in the circumstances of this case justified in filing this petition in effort to recover the debt. This is a process recognised in law for recovering debts from companies. In *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* (2018) KECA 651 (KLR), the Court of Appeal held that;

“There is no requirement under the *Insolvency Act* or the *Companies Act* which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellants have been given adequate time, opportunity and indulgence.’

11. What comes out of the above analysis is that the petitioner has made a good case for orders of liquidating the respondent. Section 427(1) of the *Insolvency Act* gives this court a wide discretion to make different orders as follows;

- a. An order dismissing the application;
- b. An order adjourning the hearing, conditionally or unconditionally;
- c. An interim liquidation order;
- d. Any other order that, in its opinion, the circumstances of the case require.

12. I have taken note of the difference between the amount claimed by the petitioner and the that admitted by the respondent. I also note that the respondent has stated that it was ready to settle the debt if it were not for lack of cooperation of the petitioner. I also have in mind that the respondent may be holding properties for third parties as securities and in order to balance the interest of the parties, I am minded to follow the route taken by Honourable Justice D.S. Majanja in *Seokang Limited v Foundation Piling* (2023) KEHC 3287 (KLR) where after citing Section 427 (1) of the *Insolvency Act*, he stated that;

“Under the aforesaid provisions, the court has direction as to whether to liquidate a Company upon hearing of the liquidation petition bearing in mind that liquidation is the death knell for a Company. Furthermore, I have considered the circumstances of the case and in particular the fact that the Company indicates it is willing to resolve the debt. Granted that the debt is a judgment debt that was incurred in 2017, I will give the company time to pay off the debt but if it defaults, the Court will have no option but to issue a liquidation order.’

13. In exercise of my discretion, I will postpone the liquidation of the respondent for some time to give it an opportunity to regularise its finances. I accordingly issue the following orders;

1. The respondent shall pay the petitioner a sum of Kshs 1,788,750.00 within ninety (90) days from the date of this judgment.
2. In default of payment of the aforesaid sum of Kshs 1,788,750.00 within the stipulated period, an order for liquidation of the respondent shall issue forthwith and automatically without further reference to this court.
3. The petitioner is awarded the costs of this cause.
4. The petitioner is at liberty to pursue the disputed balance of the claimed debt through the normal court processes after the above sum is paid.



5. This matter shall be mentioned before the Deputy Registrar on a date to be given after this judgment to confirm payment and closure of the file or for further directions in the event the payment will not have been made.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Salim holding brief for Mr. Kimathi for the petitioner (creditor) and Miss Kiendi holding brief for Mr. Mbugua for the respondent (debtor).

