



**Elmarak Limited v Afrikon Limited (Insolvency Cause E018 of 2020)
[2023] KEHC 300 (KLR) (Commercial and Tax) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 300 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E018 OF 2020**

EC MWITA, J

JANUARY 20, 2023

BETWEEN

ELMARAK LIMITED APPLICANT

AND

AFRIKON LIMITED RESPONDENT

JUDGMENT

1. Elmarak limited, (Elmarak), filed a petition dated September 11, 2020 seeking to liquidate Afrikon Limited, (Afrikon), for being insolvent. The petition is supported by an affidavit sworn on behalf of Elmarak by Kinaro Kipkemoi Kibet on September 11, 2020 and other document annexed to that affidavit.
2. Elmarak asserts that at the time of presenting this petition, Afrikon owed Kshs 50,000,000. The debt arose from an unsecured credit Elmarak granted to Afrikon to enable Afrikon acquire a performance guarantee.
3. Elmarak posits that it become necessary to present this petition after repeated demand for payment and service of the statutory notice failed to elicit positive response from Afrikon to pay the debt. Elmarak prays, therefore, that Afrikon be declared insolvent, and that an official receiver be appointed for purposes of liquidation.
4. Elmarak argues that being a creditor as defined in law and since the debt is not disputed on a substantial ground, the petition should be allowed. Elmarak relies on *Re: Global Tours and Travel Limited* [2021] eKLR for the proposition that in determining whether one is a creditor and has locus to bring the action, the court should look at whether the debt is disputed on a substantial ground.



5. Elmarak again relies on *Re Turbo Highways Eldoret Limited* [2016] eKLR, which cited the decision in *Mann v Goldstein* [1968] 2 All ER 769, that in a winding up petition, the court must be satisfied that the debt is not disputed on substantial grounds and is bonafide.
6. Elmarak further cites the decision in *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR (per Makhandia JA), that a disputed debt on substantial and bonafide grounds cannot be the basis of a winding up proceedings and creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent.
7. Elmarak asserts, therefore, that Afrikon has not raised any substantial issue with regard to the debt amount set out in the statutory demand as well as this petition. It is Elmarak's case that although a statutory demand was served, the debt has not been denied, thus the petition should be allowed with costs.

Response

8. Though the petition for insolvency was served, no response was filed and Afrikon did not attend court during the hearing of this application.

Supporting creditors

9. Several creditors have supported this petition for insolvency. Frank Saengar filed an affidavit sworn on November 17, 2021, stating that he filed a suit against Afrikon being ELRC No 677 "A" of 2014 and obtained judgment for Euros 75,000. A consent dated March 30, 2020 was filed regarding payment of decretal sum but was not honoured. Attempts to execute did not also yield anything and the amount remains unpaid.
10. Ecobank Limited, (Ecobank) filed an affidavit sworn by Edith Wanjiku in support of the petition. Wanjiku states that as an unsecured creditor, Afrikon owes Ecobank Kshs 7,702,086.20 being taxed costs under a certificate of costs dated July 14, 2020. Ecobank further states that it is a secured creditor by virtue of debentures dated January 15, 2013 and June 4, 2013.
11. According to Ecobank a consent was recorded in Civil Case No 121 of 2016 (Milimani) on October 4, 2016 where Afrikon agreed to restructure the outstanding amount of Kshs 331,370,748.73 and USD 11,402,847.28 as at September 30, 2016. Ecobank agreed to have all assets in the consent registered in the joint names of the Afrikon and itself. Afrikon further agreed to assign all current and future rentals from the assets towards repayment of the outstanding indebtedness.
12. Ecobank goes on to state that in a further consent recorded on October 3, 2019 in suit No 91 of 2017, Afrikon relinquished and assigned all rights in the properties particularized in that consent. Afrikon further relinquished and assigned to Ecobank ownership rights, title and interest in 18 trucks that were held at the Port of Mombasa as particularized in that consent, thus vesting on Ecobank with the right to sell or dispose of those assets.
13. It is Ecobank's case that Afrikon contravened the arrangement and failed to satisfy the debt of Kshs 417,297,053.59 and USD 13,659,710.07 and Ecobank continues to have priority over those assets by virtue of the debentures. Ecobank maintains that It has a fixed debenture for Kshs 65,000,000 and a further debenture of USD 1,000,000 and one of the events for default is presentation of petition for liquidation.
14. Firm Engineering Industries Limited, (Firm Engineering), also a supporting creditor, has filed an affidavit in support of the petition. Firm engineering states that in June 2017 it entered into an



agreement with Afrikon to sell to Afrikon 5 motor vehicles for USD 1,304,3. Firm Engineering released the vehicles to Afrikon. Afrikon paid some money leaving a balance of USD 964,911 plus interest that is still owing and the amount now outstanding is USD 1,000,000, inclusive of interest. The outstanding amount was acknowledged by Afrikon in letter dated February 25, 2019 and various other correspondences by Afrikon's director(s).

15. Kang'ethe & Company Advocates, (Kangethe & Company), is another supporting creditor who has also filed an affidavit in support of this petition. According to Kangethe & Company, they rendered legal services to Afrikon in several matters between 2015 and 2020, but Afrikon failed to pay for the professional services. The firm filed bills of costs in various matters which were taxed and certificates of costs issued totaling to Kshs 1,0074,908.19 but the costs remain unpaid. Kang'ethe & Company asserts that they do not hold any security over Afrikon's assets.
16. Regal Equipment Limited (Regal), is another supporting creditor, that has filed an affidavit in support of these insolvency proceedings. Regal states that on diverse dates between 2015 and 2018, it supplied Afrikon chemical products and services worth Kshs 1,633,772.74 as at January 31, 2021. However, despite raising invoices for payment, the amount remains unpaid. Regal asserts that they do not hold security over the Afrikon's assets.
17. Apex Steel Limited (Apex), also a supporting creditor, has filed an affidavit in support of the petition. Apex supplied Afrikon construction materials on credit worth Kshs 1,958,204.27. Afrikon issued cheques for the amount but they were dishonoured. In letter dated November 27, 2018, Afrikon promised to pay. Apex again supplied more materials to Afrikon but again no payment was made. The total debt stands at Kshs 16,695,911.47.
18. Tuffsteel Limited, (Tuffsteel), also a supporting creditor, has filed an affidavit in support. Tuffsteel's case is that between December 2016 and March 2021, it supplied goods to Afrikon worth Kshs 3,177,989.49 but the amount remains unpaid.

Determination

19. I have considered the petition for insolvency, supporting documents as well as submissions. As stated earlier, Afrikon was duly served with this petition and appeared through counsel but did not file a response despite given time to do so. The petition is, therefore, not opposed. This being a petition for insolvency, the question for determination is whether Elmarak has made a case for liquidating of Afrikon.
20. A company will be liquidated if it is unable to pay its debts (section 424(1)(e) of *Insolvency Act*). Section 2 of the Act defines "debt" as the obligation or liability of a person to pay money or money's worth, which includes liability under a written law, liability under a contract/bailment or liability arising from an obligation to make restitution, among others. On that basis, Elmarak asserts that Afrikon has an obligation under contract to pay the debt thus falls within the requirement of law.
21. Section 384 further states that for purposes of the Act, a company is unable to pay debts where a creditor to whom the company is indebted for hundred thousand or more, has served a 21 days written demand requiring the company to pay the debt, but the company fails to pay or take any other steps towards payment to the satisfaction of the creditor, or execution or other process issued on a judgment, decree, order of any court in favour of the creditor is returned unsatisfied in whole or part.
22. The law, requires that there be a legitimate debt and the company must have failed to pay the debt after service of the notice as required by sections 384 and 424 of the Act, before one can apply to liquidate the company. The question, therefore, is whether Elmarak has satisfied the requirements in sections



- 384 and 424 of the Act to mount a successful petition to liquidate Afrikon. Put differently, has Elmarak proved that Afrikon owes the amount demanded, served the statutory demand but Afrikon is unable to pay the debt?
23. Elmarak argues that Afrikon not only owes Kshs 50,000,000 but has also failed to pay that debt even after service of the statutory notice. On its part, Afrikon has neither denied owing the debt nor disputed the bonafides of the debt claimed to be due.
24. I have perused the record and, in particular, the statutory demand dated April 7, 2020 addressed to Afrikon. The statutory notice demanded payment of Kshs 60,000,000 and indicated that failure to pay would lead to instituting insolvency proceedings. In its letter dated August 6, 2020, Afrikon requested its advocates to confirm to Elmarak's advocates that the debt would be paid, thus admitting the debt. According to Elmarak, a consent was later entered into between the parties on how the debt would be paid but Afrikon did not comply with the terms of that consent and the debt remains unpaid.
25. The test for determining whether a company should be wound up were stated in *Re: The India Electric Works v Unknown* AIR 1970 Cal 398, citing *Re Cine Industries and Recording Co Ltd*, AIR 1942 Bom 231, thus:
- The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression 'commercially solvent' means that the existing assets and the liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be sufficient to meet the existing liabilities.
- The other test is whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained.
26. Elmarak having shown that Afrikon owes Kshs 50,000,000 and that a statutory demand has been served but no payment was forthcoming, the burden shifted to Afrikon to show that it was not commercially insolvent and there was reasonable hope of trading at a profit for which it was formed.
27. In *Mohammed Amin Brothers Ltd v Dominion of India & others* AIR 1952 Cal 323, 54 COWN 514, Harris, CJ stated:
- A winding up petition is perfectly proper remedy for enforcing payment of a just debt. It is the mode of execution which the court gives to a creditor against a company unable to pay its debts...A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bonafide disputed by the company.
28. The learned Chief Justice emphasized that a petition presented ostensibly for a winding up order to exert pressure will be dismissed and under such circumstances, may be characterized as a scandalous abuse of the process of the court. (See also *Matic General Contractors Limited v Kenya Power and Lighting Company Limited* [2001] LLR 4837; *Re M Weiss Ltd* [1992] eKLR; *Universal Hardware Limited v African Safari Club Limited* [2013] e KLR.)
29. The petition before court clearly demonstrates that Afrikon is justly indebted to Elmarak; that there is no bonafide dispute over the debt and that Afrikon has not claimed that the petition has been presented ostensibly in order to exert pressure on it to pay the debt. In other words, Afrikon has not demonstrated that it is commercially solvent and that its assets would be sufficient to meet the liabilities. In the circumstances, I am satisfied that Afrikon is unable to pay its debts and is, therefore, insolvent.



30. Consequently, the petition dated September 11, 2020 succeeds with the result, that Afrikon Limited is hereby declared insolvent and liquidated. The Official Receiver is hereby appointed as the liquidator. Elmarak Holdings Limited shall have costs of the petition, to be paid out of the assets of Afrikon Limited. Supporting creditors to prove their claims with the liquidator.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

E C MWITA

JUDGE

