



**Banda Homes Limited v Obuya (Insolvency Petition E044 of 2021)
[2023] KEHC 3409 (KLR) (Commercial and Tax) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 3409 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E044 OF 2021**

EC MWITA, J

MARCH 31, 2023

BETWEEN

BANDA HOMES LIMITED APPLICANT

AND

SUSAN OBUYA PETITIONER

RULING

1. Banda Homes Limited (the company) filed an application dated September 8, 2021 under section 6 of the *Arbitration Act*, 1995 and rule 2 of the *Arbitration Rules*, 1997; section 3A of the *Civil Procedure Act* and article 159(2) (c) of *the Constitution* seeking stay of all proceedings and to refer the dispute between the parties to arbitration.
2. The application is premised on the grounds on its face, the supporting and supplementary affidavits sworn by its director Andrew Kamau Muhiu on September 8, 2021 and November 4, 2011 respectively as well as written submissions dated January 12, 2022.
3. The accompany states that by an agreement for sale dated January 2, 2019, it agreed to sell the respondent Masionette Number 48 at Oak Wood Estate in Thika constructed on part of land reference number 294/61-64, 68-93, subdivisions of Land Reference No. 294/6 together with one (1) share in Red Oak Estate Management Co. Ltd. Under Clause H of that agreement, any dispute, difference or question relating to the construction, meaning or effect of the agreement would be referred to arbitration in accordance with the *Arbitration Act*.
4. The company asserts that since a dispute has arisen between the parties, it ought to be referred to an arbitrator for resolution in accordance with the terms of the agreement. the company argues that the debt is disputed in that the respondent claims to have fully settled the purchase price when in fact she is in arrears. The company further argues that the claim for 14% interest per annum from January 3, 2019



is not provided for in the contract. According to the company, the best forum to establish whether it owes or is required to refund any money or whether any of the parties is in breach of the agreement is through arbitration.

5. Relying on the decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, the company asserts that parties are bound by the terms of their contract and it is not the duty of the court to re-write the contracts for them.
6. The company further relies on *Salford Estates (No.2) Limited v Altomart Limited* [2015] Ch.589 [2014] EWCA Civ 1575 and *Queensway Tanzania (EPZ) Ltd (Petitioner) v Tanzania Tooku Garments Co. Ltd* (Respondent), (Miscellaneous Commercial Cause No. 43 of 2020), to support the assertions; first, that where there is a dispute on a debt subject to an arbitration agreement, the court should stay or dismiss the winding up petition unless there are wholly exceptional circumstances. Second, that the court should not allow parties to use winding up petitions as a means of bypassing arbitration agreements. The applicant also cited *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2009] 1 BCLC 274, at 278, paragraph 9), to support the position that winding up petitions should not be used to force payment of disputed debts.

Responses

7. Susan Obuya (the creditor) has opposed the application through grounds of opposition dated September 25, 2021 and written submissions dated February 7, 2022. The creditor argues that the Company has not disclosed any ground to merit the granting of the orders sought; that under section 2 of the *Insolvency Act* the court has no jurisdiction to refer Insolvency Proceedings to Arbitration or any other forum as it remains the only avenue for determination of such proceedings; that there is no arbitrable dispute and that the relief sought in the Petitioner is not capable of being granted by an Arbitrator.
8. The creditor further argues that the application is incompetent in law or otherwise and an abuse of the process of the court given that more than fifteen creditors have submitted to the jurisdiction of this court in support of the Petition.
9. It is the creditor's case that despite paying a consideration of Kshs. 5,906,060, the company failed to deliver the maisonette within 15 months from the date of execution of agreement. she issued a demand letter and statutory demand dated October 27, 2020 and April 13, 2021 respectively both of which elicited no response from the company. This forced the creditor to institute liquidation proceedings through a petition dated 13th May 2021 which has been supported by more than 15 supporting creditors that the company owes approximately Kshs. 24,567,692.00, proof that the company is unable to pay its debts.
10. The creditor contends that an arbitrator lacks jurisdiction to determine liquidation proceedings, even where there is an arbitration agreement between the parties. The creditor relies on sections 2 and 423 of the *Insolvency act* that confer exclusive jurisdiction to hear and determine liquidation proceedings on this court.
11. The creditor relies on the decisions in *Haryana Telecom Limited v Sterlite Industries (India) Limited* [1999] 5 SCC 688 and *Francis Gichaba v John Francis Kariuki Theuri* (Insolvency Cause No. E002 of 2020) [2020] eKLR for the proposition that only the High Court can grant the statutory relief of liquidation of a company, *Rift Valley Railways (K) Limited v Kenya Shell Limited* (Winding Up Cause No. 2 of 2009) [2009] eKLR, that an arbitrator has no jurisdiction to entertain any winding up proceedings if the same would be presented to him and *Niazsons (K) Ltd v China Road and Bridge Corporation (K)* (Civil Appeal No. 157 of 2000) [2001] 2 EA 502, that if a debtor agrees that money



is due, but simply fails to pay it, there is obviously no dispute, the creditor can and must proceed by action, rather than by arbitration.

12. The creditor faults the company for its willingness to refer the dispute to arbitration now, yet it failed to respond in time to the demand letter and statutory demand. The creditor relies on *Esmailji v Mistry Shamji Lalji & Co* (Civil Appeal No. 23 of 1979) [1984] KLR 150 to assert that the proper moment to ask a dispute to be referred to arbitration was at the point a demand and notice of intention to sue was issued.
13. The creditor also argues that although liquidation proceedings commenced on 13th May 2021, the company filed this application a day before the hearing of the petition just to delay the matter. The creditor maintains that the company owes her Kshs. 5,906,060.00 despite demand.
14. Relying on *London and North Western and Great Western Joint Railway Companies v J.H. Billington, Limited* [1899] A.C. 79, the creditor contends that the company has neither specified the nature of the dispute nor given any evidence that the debt is disputed to justify stay of the liquidation proceedings and referral of the matter to arbitration.
15. The creditor argues that it is in her interest and that of supporting creditors that this matter proceeds to hearing in this court. The creditor further relies on *Booz Allen and Hamilton Inc. v SBI Home Finance Limited and Other* [2011] 5 SCC 532 to support the contention that liquidation proceedings are public in nature and are not suitable for resolution in private forums such as arbitration. The creditor urges the Court to dismiss the application with costs.

Response by Veronica Wambui Waweru

16. Veronica Wambui Waweru, a supporting creditor also opposes the application through grounds of opposition dated 9th November 2021. She argues that the proceedings do not merit being referred to Arbitration; that the *Insolvency Act* does not confer jurisdiction on this Court to refer Insolvency proceedings to arbitration; that other parties have joined these proceedings as supporting creditors and they are not party to the agreement between the Company and the Petitioner.
17. The supporting creditor argues that the *Arbitration Act* does not contemplate a non-party to an arbitration agreement being compelled to submit to arbitration as a party to the arbitral proceedings; that the central issue for determination in the insolvency proceedings is whether the Company is insolvent, an issue that cannot be determined by an Arbitrator.
18. According to the supporting creditor, the purpose of Insolvency proceedings is for the benefit of all the creditors which cannot be achieved in under the *Arbitration Act*. In the view of the supporting creditor, the Company is seeking to use arbitration proceedings to run away from the inevitable consequence if the petitioner succeeded

Determination

19. The application seeks stay of the proceedings so that the dispute can be referred to arbitration. The reason for seeking to refer the matter to arbitration is that there is an agreement with an arbitration clause in the event there is a dispute. according to the company a dispute having arisen, the dispute should be referred to arbitration as required by the arbitration clause.
20. The petitioner and another supporting creditor oppose the application arguing that the issue before this court is insolvency and the *Insolvency Act* confers jurisdiction only to this court to determine the issue and not any other forum. In their view, the arbitrator cannot determine the issue of insolvency.



21. A liquidation petition is made where the company is said to be unable to pay its debts (section 424(1) (e). Section 2 of the Act defines what a “debt” is. That is the obligation or liability 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.
22. The petition has been filed because on the basis that the company is unable to pay its debt. Under section 384 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.
23. The law therefore requires that there be a legitimate debt and the company must have failed to pay the debt after service of the statutory demand before liquidation proceedings are commenced. The petitioner states that a statutory demand was served but no payment was made and therefore, filed this petition. As it is, the question before this court is whether the company has become unable to pay its debts or not, a question that falls within the sole jurisdiction of this court.
24. The company’s argument that there is an arbitration clause and therefore the matter should be referred to arbitration may not be an idle one but it comes late in the day. This is so because when the petitioner served the statutory demand, the company had an opportunity to declare a dispute and take steps to have the dispute referred to arbitration. This was not done. A petition having been filed, this court became seized of the matter and cannot defer jurisdiction to any other forum but to determine whether the petition is merited or not.
25. In the circumstances, I do not see merit in the application. It is declined and dismissed with costs to the petitioner.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2023

E C MWITA

JUDGE

