



**Corporate Insurance Company Limited v Truckmart Africa Ltd (Insolvency Petition E009 of 2022) [2023] KEHC 2568 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2568 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E009 OF 2022**

**EC MWITA, J**

**MARCH 24, 2023**

**BETWEEN**

**CORPORATE INSURANCE COMPANY LIMITED ..... APPLICANT**

**AND**

**TRUCKMART AFRICA LTD ..... RESPONDENT**

**RULING**

1. Corporate Insurance Company Limited, (the company), has filed an application dated March 29, 2022 under Orders 40 rules 1, 2, 3, 4, 10,11 and 51 rule 1 of the *Civil Procedure Rules* and rules 10 (4), 16 and 17 of the *Insolvency Regulations 2016* (as amended), seeking stay of these proceedings pending the hearing and determination of HCCOMM/E074/2022, Corporate Insurance Company Limited v Truckmart Africa Ltd, which will determine whether there is debt due to the respondent which could sustain liquidation proceedings. Alternatively, that this petition be struck out with costs.
2. The application is premised on the grounds on its face, the affidavit sworn by Ann Ndulu Kavulunze, the company's Chief Operations Officer, on March 29, 2022 and written submissions dated November 30, 2022.
3. The company's case is that even though the debt to the respondent has been settled, the respondent file this petition and had it advertised in the newspapers of March 29, 2022. According to the company, out of the Kshs 12,131,636 that had been demanded, Kshs 10,389,362.87 was paid in two installments of Kshs 6,073,153 on February 16, 2022 and Kshs 3,911,694 on March 23, 2022.
4. The company asserts that the remaining amount disputed. The company sought a reconciliation of accounts which culminated in negotiations for an out of court settlement. The payment on February 16, 2022 was made before the reconciliation of the highly disputed figures. Eventually,



the reconciliation teams on both sides agreed that the outstanding balance was Kshs 4,316,209.87. Subsequently, the company paid Kshs 3,911,694.

5. The company states that it also filed HCCC No E074 of 2022, seeking accounts to ascertain the debt owed to the respondent, if any. The company further states that the suit is not based on a different issue as claimed by the respondent and the respondent has since acknowledged existence of a dispute in HCCC No E074 of 2022.
6. The company maintains that it is solvent and capable of paying its debts; that payment of the undisputed amount is demonstration of good faith on its part and its ability to pay its debts. The company argues that if judgment was passed against it, it would pay the decretal amount, and that a company should not be liquidated if the alleged debt is disputed in good faith and on substantial grounds.
7. The applicant relies on *Synergy Industrial Credit Limited v Multiple Hauliers (EA) Limited (Insolvency Petition No E010 of 2020) [2020] eKLR; re Genghis Capital Limited (Insolvency Petition No 17 of 2018) [2019] eKLR* and *in the Matter of the Liquidation of Cytonn Investments Management PLC (Insolvency Cause E021 of 2020) [2021] KEHC 156 (KLR)*.
8. The company urges the court to allow the application and to strike out the petition with costs.

### **Response**

9. The petitioner has opposed this application through a replying affidavit by its manager, Hussein Kamal, sworn on December 2, 2022 but did not file written submissions.
10. The petitioner argues that the application is brought in bad faith because parties had come to an agreement regarding the outstanding debt and were about to sign a consent when it discovered that the company had filed HCCC No E074 of 2022.
11. According to the petitioner, a demand was served on the company on February 1, 2022, demanding payment of Kshs 12,131,636, being the outstanding balance for services rendered between February 2021 and February 2022. Subsequently, on February 3, 2022, a statutory demand was filed and on February 11, 2022, the applicant responded, acknowledging a debt of Kshs 10,652,923, but disputed the balance. The applicant paid Kshs 6,073,153 on February 16, 2022.
12. The petitioner admits that a reconciliation of accounts was done to ascertain the outstanding amount, but contends that on February 28, 2022, the reconciliation teams confirmed the outstanding to be Kshs 7,746,445.39 for unpaid invoices of Kshs 4,316,209.87, unpaid withholding tax of Kshs 207,468.80 and interest and legal fees of Kshs 322,766.70. The petitioner asserts that the applicant disputed the amount for purposes of building a defence to this petition.
13. The petitioner asserts that although the applicant paid Kshs 3,911,964 when this petition was filed, it has been unable to settle the balance of Kshs 3,834,481 to date and is, therefore, insolvent. The petitioner urges that the application be dismissed with costs.

### **Determination**

14. The company seeks striking out of this petition mainly on the ground that the debt has been paid and the remaining amount is disputed. The company has explained steps so far taken to pay the debt including a reconciliation that parties undertook which, according to the company, revealed that the debt was Kshs 10,389,362.87. The company paid Kshs 6,073,153 on February 16, 2022 before reconciliation, while Kshs 3,911,694 was paid on March 23, 2022. The company argues the debt has



been paid and any balance claimed to be outstanding is disputed. The company maintains that it is solvent as demonstrated by the payments already made. The company also states that it has filed HCCC No E074 of 2022 against the petitioner seeking accounts.

15. The petitioner admits that the company made payment, that reconciliation was done but is not categorical on the amount outstanding. The petitioner also admits that parties had agreed on the mode of settlement but discovered that the company had filed another suit. In the petitioner's view, the company denied owing the outstanding amount in order to build up a defence to this petition.
16. A petition to liquidate a company will only be made and entertained if the company 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.
17. The petitioner filed this petition on the basis that the company was unable to pay its debt. For purposes of the Act, section 384 states that 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.
18. The requirements of the law are that there be a legitimate debt and the company must have failed to pay the debt after service of the statutory demand before one can apply for the liquidation of the company. The question, therefore, is whether the petition satisfies these requirements given what the company has stated in the application before this court. Put differently, has the petitioner demonstrated that the company owes the amount demanded but is unable to pay the debt so that the petition can be heard?
19. The company argues that it has paid the undisputed amount that was due and whatever remains is disputed. It has, therefore, not failed to pay the debt to warrant the petition to proceed to hearing.
20. In its response to the application, the petitioner admits that the company made payments; that reconciliation was conducted but that the company denied owing the outstanding amount in order to build up a defence to this petition. The petitioner seems to admit that the amount said to be outstanding is disputed. The fact of the matter is that the debt was paid after service of the statutory demand. As it is, the balance is not admitted as owing and the petitioner is not categorical that the money is outstanding.
21. The test for determining whether a petition for the liquidation of a company should proceed and whether the company should eventually be wound up was 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.'



22. The company has argued that it is solvent and able to pay its debts. Indeed, the company has paid a significant part of the amount that was demanded. Parties conducted a reconciliation and the company asserts that it has paid what was found to be due. That is not all: The company has filed a suit seeking accounts from the petitioner, a clear demonstration that there is a dispute on the amount said to be due. In other words, the company maintains that the debt is denied on bonafide grounds, is commercially solvent and is capable of trading at a profit for which it was formed.
23. In *Mohammed Amin Brothers Ltd v Dominion of India & others AIR 1952 Cal 323, 54 COWN 514*, Harris, CJ stated as follows:
- 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.
24. 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, the petition 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*.)
25. The company has demonstrated that it has paid the debt that it believes was due and has even moved the court in a separate suit against the petitioner for accounts, a clear sign that the rest of the amount claimed is in dispute. The petitioner has stated that it was surprised that another suit had been filed even as parties were about to record a consent, without stating what consent it was.
26. It would appear from the company's representation, that there bonafide dispute over the debt and this court should not entertain a petition that would, on the face of it, be geared towards exerting pressure on the company to pay the disputed debt. This is so because the company's actions taken to pay the undisputed debt is demonstration that it is commercially solvent and that its assets would be sufficient to meet the liability once parties agreed on the amount in dispute.
27. In the circumstances, I am satisfied that the company has made a case that there is no reason to keep this petition hanging over its head having paid the undisputed debt. The rest of the dispute, if any, will be resolved in HCCC No E074 of 2022.
28. Consequently, the application dated March 29, 2022 succeeds and is allowed with the result, that the petition dated March 17, 2022 is struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MARCH 2023**

**E C MWITA**

**JUDGE**

