



**In re Tusker Mattresses Limited (Insolvency Petition E018 of 2020
& E026 of 2021 & Insolvency Cause E002 of 2020 (Consolidated))
[2023] KEHC 18107 (KLR) (Commercial and Tax) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18107 (KLR)

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

**INSOLVENCY PETITION E018 OF 2020 & E026 OF 2021
& INSOLVENCY CAUSE E002 OF 2020 (CONSOLIDATED)**

DAS MAJANJA, J

MAY 31, 2023

N THE MATTER OF THE INSOLVENCY ACT, 2015

AND

IN THE MATTER OF TUSKER MATTRESSES LIMITED

AND

IN THE MATTER OF PETITIONS FOR LIQUIDATION

BETWEEN

HOTPOINT APPLIANCES LIMITED 1ST PETITIONER

SYNDICATE AGENCIES LIMITED 2ND PETITIONER

ROSITALIA LIMITED 3RD PETITIONER

AND

TUSKER MATTRESSES LIMITED RESPONDENT

JUDGMENT

1. Tusker Mattresses Limited is a limited liability company incorporated under the [Companies Act, 2015](#) and operates a chain of supermarkets in the name and style of Tuskys Supermarket (“Tuskys or the company”). On various dates in the year 2020 Tuskys was faced with three petitions by Hotpoint Appliances Limited, Rositalia Limited and Syndicate Agencies Limited (“the petitioners”) who claimed that Tuskys owed them Kshs 248,220,797.38, Kshs 11,284,096.50 and Kshs 30,892,518.92



respectively. The said petitioners seek for a liquidation order against Tuksys and the appointment of a liquidator to manage its affairs.

2. The petitioners state that despite several requests and demands, Tuskys has refused and/or neglected to pay their respective debts and that it is evidently insolvent and incapable of paying its debts. They have thus moved this court by invoking the provisions of section 424 of the *Insolvency Act*, 2015 which empowers the court, in certain circumstances, to liquidate a company. In this case, they rely on section 424(c) which provides that a company may be liquidated by the court if, “the company is unable to pay its debts.” The petitioners on the other hand, as creditors of the company, have the right to present the liquidation petition by virtue of section 435(1)(b) of the *Insolvency Act*.
3. Following advertisement of the petitions, several creditors expressed their intention to appear at the hearing of the petitions. The parties agreed that the petitions would be determined based on pleadings, depositions and written submissions.
4. All the creditors who appeared in these proceedings supported liquidation of the company. The common thread running through the claim of each creditor is that they supplied goods and or services to the company and have not been paid despite issuing statutory demands under section 384(1)(a) of the *Insolvency Act*.
5. The creditors and the amounts they claim from the Company is tabulated below:



No.	Name of Creditor	Amount claimed (Kshs)
	Smart Brands Limited	38,357,070.00
	Barot Distributors Limited	27,588,065.00
	Supa Brite Limited	8,782,858.16
	Ameriken Limited	23, 669, 056.74
	d.light Limited	Not specified
	Rentco Africa Limited	500,000,000.00
	Mediamax Network Limited	2,923,200.00
	Samsutech Corporation Limited	128,176,272.00
	Grain Industries Limited	14,438,677.00
	Protrade Limited Liability	62,060,810.00
	Brand Imports (Africa) Ltd	3,302,466.55
	Brand Promoters Limited	10,631,574.00
	Safeway Hyper Markets Ltd	Not specified
	Nabico Enterprise Limited	64,434,571.00
	Afriq East Impex Ltd	11,458,464.79
	Woodlands Limited	3,884,661.00
	Bee-Care Apiaries International Limited	5,784,088.46
	Kenafic Industries Limited	5,695,057.68
	New Star Limited	9,000,000.00
	Registered Trustees Ahle Sunnat Wal Jamaat Masjid	14,505,014.00
	Vivo Energy Kenya Limited	2,815,281.00.00
	Pwani Oil Products Limited	70,986,752.57



Pietro Canobbio Joel Titus Musya T/A Makuri Auctioneers	7,289,500.00
Burn Manufacturing USA LLC	14,224,658.35
Jeff Hamilton (K) Limited	10,516,992.10
Armstrong Young (K) Limited	6,773,332.59
Startimes Limited	14,628,393.52
Brookside Dairy Limited	127,338,550.72
Texplast Industries Limited	1,969,030.83
Vaja's Manufacturers Limited	3,266,016.95
John Maina Wangudo	3,889,967.00
A.Jiwa Shamji	26,101,061.04
Premier Food Industries Limited	27,853,814.00
Dahua Technology (hk) Limited	USD 555,411.00
Estilo Limited	8,106,705.82
Adix Plastic Limited	10,858,308.20
LG Harris (EA) Ltd	22,708,329.20
Kenstar Plastic Industries Ltd	12,507,813.14
Zenko (Kenya) Limited	30,228,483.00
United Millers Limited	12,258,741.00
Simon Nzomo Nzioki t/a Mukili Enterprises	5,516,652.17
Hoist Refrigeration Sales and Services	8,169,483.35



6. The company does not, in substance, deny that it is indebted to the petitioners and creditors. In this regard, I think the observations of Visram JA., in *Pride inn Hotels & Investments Limited v Tropicana Hotels Limited* [2018]eKLR are apposite:

This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. 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 appellant has been given adequate time, opportunity and indulgence.

7. In my view, there is sufficient and prima facie evidence based on the creditor's claims to show that company is not only indebted but is also insolvent. The court should therefore issue a liquidation order unless the company can show that it is not warranted on the basis that to issue such an order would be contrary to the general policy of the *Insolvency Act* or for any other reason.
8. Tuskys opposes the petitions based on its reply to the petition dated October 14, 2022. It states that it has fully settled the debt owed to *inter alia* Equity Bank, a secured creditor and that it has executed 7 sales agreements for specific collateral charged to Diamond Trust Bank, also a secured creditor. Furthermore, it states that it is in the last stage of agreeing a debt settlement agreement with the bank to ensure a full and final settlement of that debt and that it has devised a business strategy and turnaround plan that has been generating Kshs 55,000,000.00 per month in aggregate, which has enabled the company to keep operating as a going concern whilst making profits that would ensure that it can be able to start paying its debts in strategic fashion vis-à-vis fund its growth and expansion plan.
9. Tuskys avers that it has identified a means of raising funds that could generate an estimated Kshs 3,803,000,000.00 which monies are not likely to be realized if it is liquidated and that it remains with the last burden of agreeing on a mode of settling its debts with its unsecured creditors and the Kenya Revenue Authority. That successfully achieving this last milestone will require the direction, skillset and business acumen of its directors and managers.
10. Tuskys therefore urges the court to dismiss the petitions and that it be given a chance to re-capitalize and execute a turnaround or that in the alternative, the court stays liquidation proceedings until a certain time that the court deems fit and that consequently, the court permits it to sell its non-core assets as presented and to grant it a 12-month moratorium to enable it re-capitalize and re-grow its operations.
11. Section 427(1) of the *Insolvency Act* gives the court wide discretionary powers to make any appropriate order it considers fit in the circumstances. This discretion is borne out of the fact that the Act was enacted to inter alia "provide for the liquidation of incorporated and unincorporated bodies (including ones that may be solvent); to provide as an alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors. Mativo J, (as he was then) in *Kenya Artisans Limited v Chemical & Allied Workers Union* ML HC IP No E031 of 2020 [2021] eKLR explained the objective of the Act by stating as follows:
20. The preamble shows that insolvency law provides a much-needed orderly process for the reorganization or liquidation of insolvent entities. it provides comfort in the form of a safety net for business activity by offering mechanisms for rescue or value, maximizing exit from the business and to timely distinguish between those firms that can be saved and those that



must exit fast. The preamble leaves no doubt that the insolvency law should inhibit premature liquidation of sustainable businesses.

21. The predominant objective of the Act is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to ensure that there is a balance between the interests of those who, for the want of a better word, are 'stakeholders' in a person's insolvency. The stakeholders are the debtor, the debtor's creditors, and society in general, and bankruptcy involves these three parties in a compact. These stakeholders, together with the debtor's family which also can be seen as a stakeholder, have conflicting interests which produce tension, and it is the task of the law to reconcile these interests.
12. When the present petitions were filed against Tuskys, there have been various applications filed seeking various conservatory orders. By the court's ruling of November 26, 2021, the court adjourned the hearing of the liquidation petitions filed for a period of 30 days to enable the court receive a report on the progress of the restructuring plan. The court was, at the end of that period, to make an order as to whether there was to be further adjournment to the hearing of the liquidation petitions and a stay of any and all legal proceedings, actions against the company or stay of executions of judgment, orders, decrees against it pending the hearing and determination of these proceedings. However, the court allowed one creditor, Greenspan Mall Limited liberty to commence legal proceedings against Tuskys to compel it to execute a surrender of lease over Nairobi/Block 82/8759.6. The court was also to consider and give further orders in regard to the sale of certain assets after receipt of the report required by the court in the ruling. In making this ruling, the court stated that it was being guided by the statutory objective aforesaid and was an attempt by the court to try and see if Tuskys is salvageable because liquidation should only be resorted to as a step of last resort.
13. The court, in a further ruling dated March 29, 2022 also clarified and restated its position that a secured creditor is entitled to exercise its rights under the security document or statute in the event of default by Tuskys and that the power is not subject to insolvency proceedings commenced against Tuskys. That secured creditors are entitled to exercise their statutory power of sale without recourse to the court exercising insolvency jurisdiction.
14. On September 12, 2022, the court directed the company to engage all the parties with a view to resolving the matter given that the company had indicated that it had embarked on a revival plan. It is clear that the negotiations did not bear fruit hence the hearing of the petitions.
15. In light of the admitted indebtedness and insolvency of the company, the main issue for determination is whether Tuskys should now be liquidated as advanced by all the creditors or whether there are chances of a lifeline as presented by Tuskys so that liquidation can be avoided.
16. Tuskys does not deny that it is indebted to all the listed and named creditors herein and that the cumulative debt stands at around Kshs 4.5 billion as per the summation of the tabulated debts above. As stated, Tuskys avers that it has plans or strategies for revival if given a chance. This position has been maintained by Tuskys since 2020 when the petitions were filed against it.
17. I have gone through Tuskys deposition in opposition to the petitions and its recovery plan filed pursuant to the court's directions of November 26, 2021. As at 2020, Tuskys had planned to pay the creditors by sourcing funds from the sale of its non-core assets, bridging working capital, sale of inventory and trading margins and further capitalization. None of these plans have materialized and in as much as it attempts to blame the petitioners and creditors for scaring away investors and making the



revival difficult with this proceedings, a look at Tuskys' status reports on record including financials and recovery plans point to a company that is in extreme dire straits and that nothing seems to be improving.

18. From the replying affidavit, apart from the immovable properties which are charged to bank and are not available for the unsecured creditors, the disclosed assets owned by Tuskys amount to Kshs 137,619,622.00 made up from disposal of non-core assets worth Kshs 9,000,000.00, sundry debtors totalling Kshs 91,119,622.00 and motor vehicles proposed for sale valued at Kshs 37,500,000.00. The named creditors' outstanding debts and liabilities owed by Tuskys of Kshs 4,500,000,000.00 clearly outweigh its assets. I am satisfied that as it stands, Tuskys is cannot pay its debts and is insolvent.
19. I am constrained to find that Tuskys has no prospects of revival. It has failed to prove any viability of maintaining solvency and that after 3 years, there is no chance that things might turn out for the betterment of all the creditors who have been kept at bay by these proceedings. Tuskys has already been accorded sufficient time and opportunity to restructure and turn itself around but nothing viable and positive has been forthcoming. Therefore, no meaningful purpose will be served if it is indulged or accommodated further by the court. Tuskys' must now be put to death to avoid suffering by the unsecured creditors. It must now be liquidated.
20. Hotpoint Appliances Limited has prayed that Mr Kolluri Venkata Subbaraya Kamasastri be appointed as the Liquidator of Tuskys. He from PJA Advisory Services and is an authorized insolvency practitioner. Under section 437 of the Insolvency Act, only an authorized insolvency practitioner is eligible to be appointed as a liquidator and that he/she must be able to act as such. Tuskys has not disputed that Mr Kamasastri is an authorized insolvency practitioner and that he is able to act as one. There is therefore no reason why he should not be appointed as the provisional liquidator
21. For the reasons I have set out I allow the respective petitions on the following terms:
 - a. An interim liquidation order be and is hereby issued against the company, Tusker Mattresses Limited.
 - b. Mr Kolluri Venkata Subbaraya Kamasastri be and is hereby appointed as the provisional liquidator of Tusker Mattresses Limited.
 - c. The costs of the petition shall be costs in the liquidation.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023

D. S. MAJANJA

JUDGE

