



REPUBLIC OF KENYA



**In re Sizzling Spices Limited (Insolvency Petition E017 of 2020)  
[2023] KEHC 20712 (KLR) (Commercial and Tax) (27 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20712 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E017 OF 2020  
DO CHEPKWONY, J  
JUNE 27, 2023**

**RULING**

1. Sizzling Spices Ltd, the petitioner herein filed the Liquidation Petition dated May 27, 2020 which was supported by the Affidavit of Oliver Vincent Dcunha, Sunil Dhumeja and Mrs Vidya Chidambaran, all sworn on the same day May 27, 2020.
2. The petitioner seeks to be liquidated for the reasons that it has become insolvent and unable to pay its debts. The petitioner holds that it was served with letters dated April 15, 2020 and May 18, 2020 from Rayit Management Ltd over a debt of Kshs 7,000,000.00 and it resolved through a Special General Meeting held on May 4, 2020 to petition the court to wind up the Company. The petitioner attached the Special Resolution and the Financial Statements of the Company.
3. Rayit Management Limited, a Creditor of the petitioner filed Notice of Appointment of Advocates dated June 19, 2020 through the Firm of Lilian Amere Machio & Co Advocates. The Creditor also filed Replying Affidavit through Avtar Singh Rayit one of the Directors/Shareholders of the Company sworn on September 1, 2020.
4. According to the Creditor, the Petition is full of falsehoods and should be struck out for noncompliance with Rule 10 of the Companies (winding up) Rules that requires mandatory sealing of the Petition. Further, the Creditor holds that the petitioner failed to publish the notice in a Newspaper, to file the Verifying Affidavit within 4 days of filing of the Petition, to avail statement of financial accounts and to inform the court that they filed the Petition after receiving the auctioneers notice of intention to sell its properties.
5. The Creditor argues that it entered into a lease agreement dated January 1, 2017 with the petitioner for a term of 5 years 3 months where the petitioner was required to pay Kshs 484,000.00 per month exclusive of VAT and thereafter from January 1, 2019 to March 31, 2022, a sum of Kshs 556,000.00 per month exclusive of VAT. The Creditor avers that the petitioner defaulted in the payment of rent which accrued arrears and it issued a demand letter dated October 11, 2019.



6. The Creditor has stated that in response, the petitioner acknowledged the rent arrears, paid the VAT arrears of Kshs 640,350.00 and issued post dated cheques for the full balance which showed that the petitioner was in a position to pay the debt although this was done after it was served with a Proclamation Notice.
7. It was the Creditor's contention that the petitioner illegally sublet the premises and was receiving a monthly rental income of Kshs 550,000.00 thus cannot then say that it is unable to pay the debt. Further, the Creditor listed other assets and companies owned by the Directors of the petitioner and holds that the petitioner is not insolvent as it is able to pay its debts. The Creditor urges the court to dismiss the Petition.
8. The petitioner filed Supplementary Affidavit sworn by Mrs Vidya Chidambaran sworn on September 14, 2020 wherein she holds that the petitioner complied with the law through sealing, filing of the Verifying Affidavit, publication on the Newspaper and the Kenya Gazette and the filing of the audited accounts. The petitioner disputes the claim by the Creditor and contends that by virtue of the lease agreement, it cannot be insolvent since the same was done in 2017 and it was an extension of the lease entered into in 2012.
9. The petitioner further holds that it got an investor who was willing to save it from the financial crisis that came with the corona virus pandemic and paid 4,000,000 into the account. He states that on the strength of the said amount, it issued post-dated cheques in the total sum of Kshs 4,000,000.00 which the Creditor rejected and insisted on the full payment of Kshs 7,000,000.00 and as a result, the business investor pulled out the funds which rendered the petitioner insolvent.
10. The petitioner denied the allegations of the other assets owned by the Directors and holds that the Creditor ought to prove the same. It maintains that the business was closed down and therefore the court should allow the Petition and order for dissolution of the Company.
11. The petitioner also filed further Affidavit sworn on July 9, 2020 whereupon she annexed its audited accounts for the years 2017, 2018 and 2019 in support of the Petition.
12. The Creditor filed further Affidavit sworn on September 21, 2020 which confirmed that it was only served with the Petition, that it issued demand notice dated October 11, 2019 to the petitioner. It holds that as the landlord, it was only concerned with payment of the rent and not the internal affairs of the petitioners' partners injecting and withdrawing funds. The Creditor holds that it rejected the cheques of Kshs 4,000,000.00 since it was below the agreed 75% of the total rent arrears of Kshs 7,000,000.00.
13. The Creditor holds that the petitioner cannot use Coronavirus Pandemic as an excuse since it was already in arrears as from January, 2019 and that they had the option of moving to cheaper premises instead of causing losses upon the Creditor.
14. In the submissions, the petitioner holds that it has complied with the *Insolvency Act* and Insolvency Rules and urges the court to allow the Liquidation Petition.

### **Analysis and Determination**

15. Having considered the application alongside the arguments for and against the prayers sought both in support and rebuttal thereof, the main issue for consideration is whether the liquidation petition should be allowed.
16. A liquidation petition is premised under Section 424 of the *Insolvency Act* which states:-

“ 424.



- (1) A Company may be liquidated by the Court if-
- a. The Company has by Special Resolution resolved that the Company be liquidated by the Court.
  - b. Being a Public Company that was registered as such on its original incorporation has not been issued with a Trading Certificate under the [Companies Act 2015](#), more than twelve months has elapsed since it was so registered.
  - c. The Company does not commence its business within twelve months from its incorporation or suspends its business for a whole year. Except in the case of a Private Company limited by shares or by guarantee the number of members is reduced to below two.
  - d. The Company is unable to pay its debts.
  - e. The Court is of the opinion that it is just and equitable that the Company should be liquidated.”
17. The procedure for filing the application for liquidation is enshrined under Regulation 77B of the [Insolvency Rules](#) which states,
- “77B. (1) (a) by way of Petition in Form 33B1 set out in the First Schedule-
- (b) Accompanied by a verifying affidavit in Form 33B2 set out in the First Schedule; and
- (2) The petition for liquidation shall be accompanied by the following documents —
- (a) A statutory demand if the reason for Petition is indebtedness; and
  - (b) A statement of financial position in Form 32 set out in the First Schedule where necessary.”
18. It is trite that the [Insolvency Act](#) gives courts discretion in Liquidation of Companies to either make or deny the order. This was the holding of [Re Ukwala Supermarket Limited](#) [2019]eKLR, where the Court stated:-
- “In any Petition brought for the purposes of liquidating a Company, the Court has the discretion once the petitioner has established the right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.”
19. In this case, the petitioner has a right to file the Liquidation Petition under Section 425 of the [Insolvency Act](#) as it has been filed by the Company through its Directors and it has been filed on grounds that it is an unable to pay its debts. However, the court cannot automatically allow the Liquidation Petition as



there must be proof of the inability to pay debts or the insolvency. See the case of *Intona Ranch Ltd v O'Brien* [1992] KLR 1, where the Court of Appeal expressly stated that: -

“It is settled law that the winding up order is not automatic. There must be proof of insolvency and/or inability on the part of the Company to pay its debts.”

20. The circumstances which show that a Company is unable to pay its debts are found under Section 384 of the *Insolvency Act* which states as follows: -
- (1) For purposes of this Part, a Company is unable to pay its debts-
    - a. if a creditor (by assignment of otherwise) to whom the Company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the Company’s Registered Office, a written demand requiring the Company to pay the debt and the Company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor.
    - b. if execution or other process issued on a Judgments, decree or order of any court in favour of a Creditor of the Company is returned unsatisfied in whole or in part; or
    - c. If it is proved to the satisfaction of the Court that the Company is unable to pay its debts as they fall due.
  - (2) A Company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the Company’s assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
  - (3) The insolvency regulations may increase or reduce the amount specified in subsection (1) (a).
21. In this case, the petitioner holds that it is unable to pay the debts and it filed its Bank Statements and audited accounts to show that the business has been running on losses. It however did not file the mandatory Statement of Financial Accounts in Form 32 which is set out under Regulation 77B of the *Insolvency Rules*.
22. The requirement of the Statement of Financial Accounts is in mandatory terms which must have been furnished to show the court the list of its assets and liabilities to enable it assess the solvency or insolvency levels of the petitioner . Therefore, there is nothing to show that the petitioner is unable to pay its debts or that the liabilities exceed the assets of the Company.
23. In that regard, the Liquidation Petition dated May 27, 2020 lacks merits and is hereby dismissed with costs to the Creditor.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 27th DAY OF JUNE, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

**In the presence of:**

**No appearance for and by either parties.**

**Court Assistant – Martin**

