



DAC Aviation (EA) Limited v AMRA Leasing Limited & 3 others (Insolvency Petition E039 of 2020) [2023] KEHC 20525 (KLR) (Commercial and Tax) (25 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20525 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E039 OF 2020**

DAS MAJANJA, J

JULY 25, 2023

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND

IN THE MATTER OF DAC AVIATION (EA) LIMITED

BETWEEN

DAC AVIATION (EA) LIMITED APPLICANT

AND

AMRA LEASING LIMITED 1ST RESPONDENT

FINEJET LIMITED 2ND RESPONDENT

SAIC Q400 LIMITED 3RD RESPONDENT

KCB BANK KENYA LIMITED 4TH RESPONDENT

RULING

1. On 23.09.2022, the court issued a liquidation order against the Applicant (“the Company”) after coming to the conclusion that it was unable to pay its debts (“the Liquidation Order”) following a petition presented by the 1st Respondent (“the Petitioner”). However, the court stayed the Liquidation Order for a period of three months from the date of the order to enable the parties agree on terms of payment of the judgment debt of GBP 8,992,980.25 due to the Petitioner. The parties were at liberty to move the court for further and other orders.
2. The order for stay was extended from time to time. The Company moved the court by an application dated December 15, 2022 seeking, inter alia, an order staying the liquidation order for a further 120 days. I heard the application and on 14.03.2023 and granted the following order:



1. The Liquidation Order issued on the September 23, 2022 be and is hereby stayed for a further period of 90 days from the date hereof on the terms set out hereunder.
2. The Company shall file in this court its Statement of Accounts showing its financial position not limited to assets, liabilities and revenues within 21 days from the date hereof.
3. The Company shall file its plan for payment of its creditors within 21 days from the date hereof.
4. An order be and is hereby issued staying any and all execution of all judgments, decrees, orders interim or otherwise execution proceedings against the Company's assets. For avoidance of doubt, this order shall not amount to stay of any pending court proceedings or stay of enforcement of security interests by secured creditors.
5. The matter shall be mentioned in court on a date fixed to confirm compliance.
3. The matter was mentioned from time to time to enable the Company comply with orders on 14.03.2023, 12.04.2023, 23.05.2023 and 14.06.2023. The matter was heard on 21.06.2023 when the parties addressed the court on whether the order nisi should be discharged and the Liquidation Order confirmed.
4. The Company has relied on the affidavits of its director, Paul Muga, two are sworn on 10.05.2023 and one sworn on 11.05.2023. The Company also filed a report prepared by Riogi and Associates Accountants dated 14.03.2023 titled, "Annual Report and Audited Financial Statements for the year ended December 31, 2022."
5. In the deposition of 10.05.2023, the Company explained that it commissioned an audit by Chacha Auditors & Associates to be furnished by 30.06.2023. It also stated that it had instructed its creditor Nile Drilling & Service Co. Ltd to pay AMRA, the Petitioner, USD 709,793.17. It also committed to settling the debt due to SAICQ 400 and Finjet Ltd, the 2nd and 3rd Petitioners herein by assigning its debts from Fenix Recycling Lichtenberglaan loan 3800 Suit Tridens, Belgium to the tune of USD 350,150.52. As regards other creditors, it avers as at 22nd February 2021, the Company had a total 147 unpaid creditors of which 85 continue to be paid from proceeds of AMREF Ambulance Aircraft contract which is still subsisting.
6. The Company further states that it has an office block at Wilson Airport charged to KCB, the 4th Respondent, but which it also leases to enable it pay daily creditors and staff from rental income. It proposes to sell the property to a thirty party once it receives a no objection letter from KCB. It contends that once the property is discharged, it will free up capital to settle its financial obligations and invest in additional aircrafts to expand its operations. It also states that it provides services to other aircraft companies. In support of its application the Company produced an Annual Report and Audited Financial statement for the year ending 31.12.2020 prepared by Riogi & Associates Accountants.
7. When the matter came up for hearing, Counsel for the Company disowned the Financial Statements dated 14.03.2023 and sought to have them expunged on account of a disagreement with the accountants. The Company urged the court to consider the depositions already filed in the matter and discharge the order nisi.
8. The Respondents urged the court to confirm the liquidation order. They supported the position taken by the Petitioner who relies on the affidavit of Paul Clark, the Petitioner's Lease Manager, sworn on 17.07.2023.



9. As regards the Financial Statements prepared by Riogi & Associates, Counsel for the Petitioner wrote to the said Accountants enquiring from them whether they had prepared the Financial Statements produced in court by the Company. The Accountants, by an email dated 26.06.2023, responded as follows:

While we acknowledge that we have offered audit service to DAC Aviation for the years 2019 and 2020 we have not been subsequently engaged to carry out any audit for the year 2022 or the immediate prior year 2021 and as such have not prepared any financial statements for or on behalf of DAC Aviation of the year 2022, either in draft form or signed final form.

10. The Petitioner submits that the Company has not complied with the court's directions of 14.03.2023. That it has only provided incomplete documents which indicate partial payments and has not provided the full and updated list of creditors or a payment plan for settling the debts due to creditors. The Petitioner points out that vide Gazette Notice dated 03.03.2023, the Kenya Civil Aviation Authority declined to grant the Company an Air Service Licence hence the Company is not in a position to trade further. The Petitioner avers that the Company has been granted sufficient indulgence since 2020 to resolve the debt due to it and has instead preferred other creditors.

11. As I have stated in the previous decisions, the court has power to make any appropriate order it considers fit in the circumstances. This position is anchored in section 427(1) of the Act which provides, in part, that the court, on the hearing of a liquidation application, "may make such of the following orders as it considers appropriate" or "any other order that, in its opinion, the circumstances of the case require". The court is guided by the policy of the Act which 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." (see *Kenya Artisans Limited v Chemical & Allied Workers Union* ML HC IP No. E031 of 2020 [2021] eKLR).

12. In my ruling dated 14.03.2023, I was convinced on the material before the court at the time that the Company's business appeared to be on the upswing hence I was inclined to grant the Company time to demonstrate that its business had prospects of revival. I granted order the order bearing in mind the following principles:

First, the Company must disclose to the court its financial position in the form of statement(s) of account including but not limited to its assets, revenues and liabilities since the information so far does not give a complete picture. This information will enable the court determine whether in fact the Company deserves to be salvaged. Second, the Company must demonstrate that it is treating all the debtors of the same class equally. It is upon these principles that I intend to condition the order of stay.

13. It is against the aforesaid background that I now turn to consider whether I should discharge the order nisi. I agree with the Petitioner and Respondents that the Company has not been candid about its financial position. It has provided partial information that only gives a glimpse of the financial position of the Company. It has failed to disclose all its creditors and the amount due to each of them. It has also failed to disclose the income it is earning. In particular, it has failed to inform the court and the body of creditors its actual financial position and has not filed any payment plan for the creditors. Without such a plan presented for the court and creditors to interrogate, the court cannot grant the Company any further indulgence in the matter.

14. As regards financial statements, the Company initially undertook to present accounts prepared by Chacha Auditors and Associates but none have been forthcoming. The Company has not only



disowned the Financial Statements it has produced in evidence; it also turns out that the accounts presented may have been fraudulent. The only inference the court can make in the circumstances is that the Company is actively or fraudulently concealing its financial situation from the court. It cannot be gainsaid that in matters of insolvency, full and frank disclosure is essential if the court is to exercise its discretion in favour of the Company to enable it start afresh. Based on the material on record and the conduct of the Company it is difficult to conclude that it is worth saving.

15. It is clear that the Company has failed to comply with the orders made on 14.03.2023. It has failed to make full disclosure of its financial position. It has not demonstrated that if granted sufficient time and opportunity, it may revive its business. On the contrary, the denial of its licence by the Kenya Civil Aviation Authority, a fact the Company has not denied, marks the end of the Company's business. It has not demonstrated to the court that it has taken any steps to ameliorate this position.
16. For the reasons that I have set out above, I now make the following dispositive orders:
 - a. The order issued on September 23, 2022 staying the Liquidation Order be and is hereby discharged.
 - b. Liquidation Order issued on the September 23, 2022 is confirmed.
 - c. The Official Receiver is hereby appointed the Interim Liquidator.
 - d. The costs of the petition shall be costs in the liquidation.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2023.

D. S. MAJANJA

JUDGE

