



**Joyce Murugi Njagi t/a Crossworld Institute of Professional  
Studies v Twiga Properties Ltd (Insolvency Cause E006 of 2021)  
[2022] KEHC 12 (KLR) (Commercial and Tax) (28 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 12 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E006 OF 2021**

**A MABEYA, J**

**JANUARY 28, 2022**

**BETWEEN**

**JOYCE MURUGI NJAGI T/A CROSSWORLD INSTITUTE OF PROFESSIONAL  
STUDIES ..... CREDITOR**

**AND**

**TWIGA PROPERTIES LTD ..... DEBTOR**

**JUDGMENT**

1. The Petition concerned Twiga Properties Limited (“the Company”) which was incorporated in Kenya under the *Companies Act*, Cap 486 of the Laws of Kenya (repealed).
2. The Petitioner presented the Liquidation Petition dated 31/3/2021 as a creditor. She stated that she had leases from the Company Office Number 201, 2<sup>nd</sup> floor, Twiga Towers located on L.R No. 209/2559 Murang’a Road, Nairobi. That the monthly payable rent was Kshs. 72,000/=. On 15/3/2006, she received a notice from KRA directing her to pay the monthly rent directly to KRA and not to the respondent.
3. The respondent then issued her with a notice to terminate the tenancy agreement on the grounds that she had defaulted in paying rent. The respondent proceeded to instruct auctioneers known as Leakey Auctioneer’s before the expiry of the notice period, who proclaimed for distress of rent and removed all her items from the premises and locked the said office.
4. The petitioner filed CMC Number 9038 of 2007 at Nairobi wherein the court found that she did not owe the respondent any rent. The court then ordered Leakey Auctioneers to unconditionally return all the petitioners goods. After the matter was fully heard, the court delivered judgment on 7/5/2018



in favor of the petitioner for Kshs. 1,620,000/= plus costs and interest at 12%. A decree was issued on 6/11/2018 for Kshs. 3,796,010.95.

5. The petitioner attempted to execute the decree through Philip Metto t/a Sterling Auctioneers. The auctioneers proclaimed properties but later found out that the property belonged to Real Management Services Limited and not the respondent.
6. The petitioner then filed an application dated 4/1/2019 seeking a preservation order for L.R No. 209/2559 and for orders that the parcel be advertised and be sold by public auction in settlement of the decree. The respondent successfully argued that the land did not belong to it and the application was dismissed. The petitioner could not identify any other property belonging to the respondent hence the decree remains unsatisfied to date.
7. She then issued a demand dated 27/1/2021 to the respondent who failed to pay the debt despite the lapse of the 21 days' notice given. She contended that the respondent was insolvent as it was unable to pay its debts when they fell due. To the best of her knowledge, there was no application to set aside the statutory demand pending before Court. She therefore prayed that the respondent be liquidated as it was necessary and just in the circumstances.
8. The respondent opposed the petition vide a replying affidavit sworn on 25/3/2021. It was contended that the decree was under challenge in Miscellaneous 150/2021 wherein the court had granted a stay of execution and allocated a hearing date of 8/6/2021.
9. That the application was premature and should have been adjourned pending the intended appeal. That the applicant had previously attempted to attach the respondent's property but failed for non-compliance with the Civil Procedure and that no other attempts had been made to execute the decree. Finally, that the application was meant to embarrass the respondent.
10. It was submitted for the petitioner that the replying affidavit should not be considered as it was filed out of time. It had been filed and served on 25/5/2021 at 6pm, hours before the hearing of the petition, yet the same was supposed to have been filed and served by 27/4/2021. That the alleged challenge to the decree was made after the present petition had been lodged and the stay lapsed on 10/5/2021.
11. In his submissions, Counsel for the respondent stated that the amount owed was not certain. That the appeal against the decree had a chance of success. That failure to realize the execution was not a ground for liquidation hence the process was being used for improper purpose. That the notice was not properly served.
12. I have considered the pleadings of the respective parties and their submissions. The sole issue for determination is whether the Company herein ought to be liquidated. The petitioner's case was that the Company is unable to pay its debts.
13. Section 384(1) and (2) of the [Insolvency Act](#) deals with circumstances under which a company is declared as being unable to pay its debts. It provides as follows: -

“(1) For the purposes of this Part, a company is unable to pay its debts—

- (a) If a creditor (by assignment or 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 judgment, 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)
- ...”.

14. In the present case, the petitioner has an unexecuted decree against the Company. She was unable to execute the same despite various efforts to that effect. The Company’s assets were proclaimed but the attachment was not possible as it emerged that the assets belonged to a third party known as Real Management Services Limited and not to the respondent.
15. Further, it also emerged that parcel number L.R. NO. 209/2559 whereon the Company offices were situated did not belong to the respondent. The same could not therefore be attached in execution of the said decree.
16. In the circumstances, I find that the Company is unable to pay the petitioners debt by virtue of Section 384(1) of the *Insolvency Act* (“the Act”).
17. Section 424(1) of the Act, sets out the circumstances in which a company may be liquidated by the court and it provides as follows: -

“(1) A company may be liquidated by the Court if—

...

- (e) The company is unable to pay its debts;
- (g) The Court is of the opinion that it is just and equitable that the company should be liquidated”.

18. On the other hand, section 425 of the Act provides for persons eligible to apply to the Court for liquidation. These are; the company or its directors, a creditor or creditors, a contributory or contributories of the company and the provisional liquidator or an administrator of the company.
19. The procedure for liquidation by the Court is provided for in Regulation 77B of the *Insolvency Act* (Amendment) Regulations 2018. For purposes of Section 425 of the *Insolvency Act*, an application for liquidation shall meet the procedural requirements of Regulation 77B (1) of the 2018. These are: -

“(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”.



20. The present petition did satisfy all the foregoing requirements and was therefore properly before Court.
21. The Act confers wide judicial discretion on liquidation. It is trite law that if the Court finds that a Petition to liquidate a Company is not brought in good faith, it would dismiss the same. In *Matic General Contractors Limited Vs. The Kenya Power And Lighting Company Limited (2001) Llr 4837 (Cak)*, the court observed that: -

“It is thoroughly settled now that, on a Petition to wind up, no order can be made until the debt is proved, where there is a bona fide dispute, as to its existence. But if a man will present a Petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bona fide disputed, and also when he knows that the Company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the Petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Acts to be made the vehicle of oppression”.
22. Liquidating a company is a draconian step which amounts corporate execution. In *Kenya Power And Lighting Company Limited Vs. National Cereals & Produce Board (2002) 1 Klr 652*, Ringera J (as he then was) likened it to ‘passing a death sentence on an individual.’
23. The Court is alive to the wide powers given to it by section 427 of the Act. It is therein provided that: -

“On hearing a liquidation Petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding-up order on the ground only that the assets of the Company have been mortgaged to an amount equal to or in excess of those assets or that the Company has no assets”.
24. The petitioner is a creditor of the Company by virtue of holding a valid decree that has not been satisfied. The same has remained unsatisfied since 2018, for over 3 years. It was entitled to bring the petition under section 425(1)(b) of the Act. I am satisfied that the Company was properly served with a Statutory Notice under section 384(1)(a) of the Act as a pre-condition for presentation of the petition.
25. The petitioner established that the company was unable to pay its debt. Section 424(1) (e) of the Act empowers this Court to liquidate a company where it is unable to pay its debts. I find that the petitioner established the grounds for liquidation and is entitled to an order of liquidation pursuant to section 427(1)(c) of the Act.
26. The grounds set up by the respondent in opposition were without merit. The stay order lapsed on 10/5/2021. The allegation that the Statutory Notice was not properly served also fails. According to the affidavit of service dated 25/5/2021, the process server personally served the respondent’s legal officer who directed that their advocate on record ought to be served too.
27. Further, though the applicant only attached the certificate of urgency and not the application itself, this court could infer that the application in HCC MISC NO. 150 of 2021 was seeking to file an appeal out of time. As it stands, there is no appeal on record. The respondent cannot attempt to stall these proceedings on account of an application which had not been prosecuted and on a non-existent appeal.
28. In conclusion, I allow the petition and make the following orders: -



- a) A Liquidation Order be and is hereby issued in respect of the Company, Twiga Properties Limited.
- b) The Official Receiver is hereby appointed the Liquidator.
- c) The cost of the petition shall be borne out of the Company assets.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JANUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

