



**In re Olerai Nurseries Limited (Insolvency Cause E008 of 2019)  
[2022] KEHC 11125 (KLR) (Commercial and Tax) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11125 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E008 OF 2019**

**DAS MAJANJA, J**

**JULY 28, 2022**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND**

**IN THE MATTER OF OLERAI NURSERIES LIMITED**

**BETWEEN**

**KAGWIMI KANG'ETHE AND COMPANY ADVOCATES ..... CREDITOR**

**AND**

**OLERAI NURSERIES LIMITED ..... PETITIONER**

**RULING**

1. Anthony George Combos and Penelope Combos, the directors of Olerai Nurseries Limited (“the company”) moved the court by way of liquidation petition dated June 24, 2019, (“the petition”) under section 425 of the *Insolvency Act* (“the Act”). The petition seeks an order for its liquidation on the basis that it has ceased operations, it is unable to meet its financial obligations to creditors and suppliers particularly the firm of Kagwimi Kang'ethe & Co Advocates which it owes KES 1,364,623.00 together with interest at court rates from October 12, 2017.
2. The petition is accompanied by the verifying affidavit of Anthony George Combos to which he attaches a resolution for the special general meeting of the company held on June 18, 2019 (“the resolution”). The resolution is to the effect that the company be wound up and struck off the register of companies as it is unable to pay its debts and that the firm of LJA Associates Advocates LLP be appointed to represent it during the liquidation process.
3. The firm of Kagwimi Kang'ethe & Company Advocates (“the creditor”) filed a notice of intention to appear and oppose the petition and a replying affidavit sworn by the George Kang'ethe, Advocate



on October 5, 2021. In the deposition, the creditor raises a preliminary objection that the Petition is incompetent and that the court lacks jurisdiction to entertain the Petition.

4. When the matter came up for directions, I directed the parties to file written submissions on the preliminary objection which is the subject of this ruling.
5. The creditor states that the resolution expressly states that the company be wound on the ground that it is unable to pay its debts but it does not state that the company should be liquidated by the court. It therefore contends the resolution is a special resolution to voluntarily liquidate the company passed pursuant to section 393 (1)(b) contained in division 2 of the Act and not a resolution that the company be liquidated by the court. It adds that section 423(1) of the Act expressly provides that the High Court has the jurisdiction to supervise the liquidation of the companies registered in Kenya but under section 423(2) of the Act expressly states that section 423(1) does not apply to a company that is already in voluntary liquidation in accordance with division 2 to 5 of the Act.
6. The creditor relies on section 395 of the Act which states that the voluntary liquidation of a company commences when a resolution for voluntary liquidation is passed. In this regard, the creditor holds that voluntary liquidation of the company commenced on June 18, 2019 when the resolution was passed hence the on-going liquidation is a "voluntary liquidation" as opposed to "liquidation by the court".
7. The creditor submits that the petition herein having been filed in accordance with section 425 of the Act is incompetent as the said section does not apply to a voluntary liquidation. It contends that section 425(1)(e) of the Act expressly provides that an application to the court for the liquidation of a company, when the company is in voluntary liquidation, can only be made by the liquidator of the company not the company itself or its directors as purported. The creditor therefore submits that the instant petition is incompetent and no orders can be lawfully granted by this honourable court pursuant to section 425 of the Act as sought. The creditor therefore submits that this court lacks jurisdiction to entertain these proceedings.
8. The main issue for determination is whether this court has jurisdiction resolve this liquidation petition. The issue of jurisdiction in a matter is critical as it determines whether or not the court can proceed to hear it or down its tools if it lacks the jurisdiction. It is settled that without jurisdiction, the court cannot proceed further and must down tools (see The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1). In Samuel Kamau Macharia v Kenya Commercial Bank and 2 others SCK Civil Application No 2 of 2011 [2012] eKLR the Supreme Court held that,

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law".

9. In this case, High Court derives its jurisdiction expressly from section 423 of the Act which states as follows:

423. Jurisdiction of High Court to supervise liquidation of companies

- (1) Only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya.
- (2) Subsection (1) does not apply to a company that is in voluntary liquidation in accordance with divisions 2 to 5.



10. The question that follows therefore is whether this insolvency cause is a voluntary liquidation or liquidation by the court. Section 393 of the Act gives the circumstances in which company may be liquidated voluntarily as follows:

393. Circumstances in which company may be liquidated voluntarily

- (1) A company may be liquidated voluntarily—
  - (a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution providing for its voluntary liquidation; or
  - (b) if the company resolves by special resolution that it be liquidated voluntarily.

11. Section 424 of the Act on the other hand, gives circumstances in which company may be liquidated by the court. It states as follows:

424. Circumstances in which company may be liquidated by the court

- (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—
    - (i) the company has not been issued with a trading certificate under the Companies Act, 2015; and
    - (ii) 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;
  - (d) except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;
  - (e) the company is unable to pay its debts;
  - (f) at the time at which a moratorium for the company ends under section 645— a voluntary arrangement made under part IX does not have effect in relation to the company; or
  - (g) the court is of the opinion that it is just and equitable that the company should be liquidated.

12. The wording of sections 393 and 424 of the Act is clear that the nature of the liquidation depends on the nature and substance of the special resolution. The special resolution ought to be very specific



whether the liquidation is voluntary or by court. In this case, the resolution is silent on the type of liquidation since it only states,

‘That the company be wound up and struck off the companies register as the company is unable to pay its debts.’ The court cannot therefore infer that since the resolution is not specific, it should be construed to be a voluntary liquidation as urged by the creditor.

13. However, the court has discretion based on article 159(2)(d) of the [Constitution](#) to overlook procedural technicalities. In this case though the intent is not clear from the wordings of the resolution, it is in the interests of justice this court makes such inference from the procedure followed by the company and the provisions of the Act the petitioner relies on. [In Re Ukwala Supermarket Limited](#) NRB HCCOMM IC No E015 of 2018 [2019] eKLR the court stated,

“Part VI of the [Insolvency Act, 2015](#) provides for liquidation of companies and section 423 gives the High Court the jurisdiction to supervise the liquidation of companies. It distinguishes between voluntary liquidation and liquidation by the court. The matter before the court is clearly not a voluntary liquidation and must be seen to have been brought pursuant to section 424 (a) and 425(1) (a). These provisions merely permit and provide for liquidation of a company by the court.”

14. The petition is filed pursuant to section 425 of the [Act](#) based on the grounds stipulated under section 424 that the company is unable to pay its debts. In terms of procedure the company has complied with the procedure for liquidation by the Court set out in regulation 77B of the [Insolvency Act \(Amendment\) Regulations 2018](#) (“the Rules”) which states as follows:

- (1) For purposes of section 425 of the [Insolvency Act](#), an application for liquidation shall be (a) by way of petition in form 32C as set out in the first schedule (b) Accompanied by a verifying affidavit in form 32D as set out in the first schedule; and
- (2) The petition for liquidation shall be accompanied by the following documents —
  - (a) A statutory demand in form 32E as set out in the First schedule 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.

15. The procedure for voluntary liquidation is different. Section 394 of the [Act](#) states as follows:

394. Notice of resolution to liquidate

- (1) Within fourteen days after a company has passed a resolution for its voluntary liquidation, it shall publish a notice setting out the resolution—
  - (a) once in the Gazette;
  - (b) once in at least two newspapers circulating in the area in which the company has its principal place of business in Kenya; and
  - (c) on the company's website (if any).



16. Looking at the substance of the proceedings, I hold that the company complied with the requisite procedures for liquidation by the court under section 425(1)(a) of the *Act*. I find that while the resolution did not specifically indicate whether the liquidation was voluntary or by court, the provisions of the law cited, the procedure followed clearly show that the liquidation was intended to be by the court. Finally, I do not find any prejudice to any of the company's creditors. As this is petition for liquidation by court, I hold that this court has jurisdiction by dint of section 423(1) of the *Act*.
17. The creditor's preliminary objection is accordingly dismissed. The costs of these proceedings shall be costs in the petition.
18. The hearing of the petition may now proceed on a date fixed.

**SIGNED AT NAIROBI**

**DS MAJANJA**

**JUDGE**

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

**D CHEPKWONY**

**JUDGE**

Court Assistant: Mr M Onyango.

Mr Kang'ethe instructed by Kagwimi Kang'ethe and Company Advocates for the applicant/creditor.

Ms Dave with her Mr Onyango instructed by LJA Associates Advocates for the respondent/petitioner.

