



**Macharia v Beverage Edge Limited (Insolvency Petition 4 of 2016)  
[2022] KEHC 16056 (KLR) (Commercial and Tax) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 16056 (KLR)

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

**INSOLVENCY PETITION 4 OF 2016**

**WA OKWANY, J**

**NOVEMBER 24, 2022**

**IN THE MATTER OF THE COMPANIES ACT (CAP 486 OF  
THE LAWS OF KENYA)**

**(NOW REPEALED)**

**AS READ WITH SECTIONS 423 (1), 424 (1) (E) & G AND  
734 (1) & (2) OF THE INSOLVENCY ACT, ACT NO. 18 OF**

**2015**

**IN THE MATTER OF BEVERAGE EDGE LIMITED**

**AND**

**IN THE MATTER OF A PETITION BY A MINORITY  
SHAREHOLDER - ANTHONY MWANGI MACHARIA**

**BETWEEN**

**ANTHONY MWANGI MACHARIA ..... PETITIONER**

**AND**

**BEVERAGE EDGE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. Beverage Edge Limited ("the company") was incorporated on November 21, 2011 as a company limited by shares.
2. The company has three shareholders namely: -



- a. Richard Waithaka Mburu 45 %
  - b. Morris Muli Masa 45 %
  - c. Anthony Mwangi Macharia
3. Antony Mwangi Macharia, who was at the time of filing this petition the Managing Director and minority shareholder of the company, instituted this petition on September 7, 2016 seeking a liquidation order against the company on the basis that the company was unable to pay its debts, to wit, the petitioner's salary arrears and was engaged in oppressive conduct the particulars of which he listed as follows:
- See particulars.
4. The company opposed the petition through the replying affidavit of its Director Mr Richard Waithaka Mburu who avers that at no time was there any agreement to pay the petitioner the purported salary and that the petitioner had only been allowed to run the company profitably and that thereafter the profit would be shared among the directors based on individual contribution and efforts. He states that the petitioner's claim for indebtedness by the company is baseless and further, that the allegation of oppressive conduct is not true as the company has been run diligently and in full compliance with the articles of association.
5. Mr Mburu avers that the petitioner run down the company and on various occasions fraudulently transferred the company's monies to his personal account thereby denying the company its income while defrauding the other directors thus necessitating the change of the signing mandates of the company's bank account.
6. It is the company's case that the petitioner's malpractices led to the termination of the petitioner's mandate from the day to day running of the company. The company accuses the petitioner of fraudulently opening a new company "Beverage Three Sixty Limited" through which company the petitioner used to enter into direct competition with the company.
7. The company states that it filed a suit against the petitioner for passing off at the High in Nairobi in Commercial Case Number 232 of 2017 which matter is pending determination.
8. The petitioner canvassed the petition by way of written submissions while the company opted to rely on the replying affidavit.
9. I have considered the pleadings filed herein and the petitioner's submissions. The main issue for determination is whether the petitioner has made out a case for the liquidation of the company.
10. The petitioner seeks an order for dissolution of the company under the circumstances prescribed under section 424 (1) (e) & (g) of the *Insolvency Act* where the court is required to determine whether the company is unable to pay its debts and whether, in the circumstances of this case, it is just and equitable that the company ought to be liquidated.
11. Section 384 (a) of the *Insolvency Act* provides that a company is unable to pay its debts:
- "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"



12. A simple reading of the above provision shows that the two conditions to be met by a creditor before a liquidation order can be issued are firstly; proof that the creditor must have issued a written demand requiring the company to pay the debt, and secondly; that the company failed to pay the debt for a period of twenty one days after receipt of the demand letter.
13. In the instant case, it was not disputed that the petitioner issued a demand notice claiming that the company owes him the sum of Kshs 6,036,990.00 comprising of salary arrears for the years 2015 in the sum of Kshs 1, 800, 000.00 and Kshs 1,200,000.00 as at June 30, 2016. The petitioner claimed that the remaining balance of Kshs 3,036,990.00 are funds that he injected into the company on the understanding that the company would pay back the money together with interest upon the books of accounts being tabled before the company's Board.
14. As I have already stated in this judgment, the company vehemently denied the petitioner's claims and accused the petitioner of malpractices that necessitated the termination of his tenure as the company's Managing Director and the filing of suit for passing off which suit is still pending determination.
15. Considering the position taken by the company especially the undisputed fact that it sued the petitioner for alleged passing off, i find that the petitioner's claim that the company is indebted to him has not been proved to the required standards. I note that even though the petitioner claimed a specific amount of money from the company, no tangible evidence was presented to satisfy this court that the money is actually owed by the company apart from demand letters. i find that demand letters cannot be construed as proof of debt.
16. For the above reasons, I find that the instant petition is not merited and I therefore dismiss it with costs to the company.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

**Mr. Aluoch for Wetangula for petitioner.**

**No appearance for respondent**

**Court Assistant- Sylvia**

