



Kenya Walking Survivors Safaris Ltd v Rosita Investments Limited (Insolvency Petition E158 of 2019) [2021] KEHC 317 (KLR) (Commercial and Tax) (29 November 2021) (Judgment)

Neutral citation: [2021] KEHC 317 (KLR)

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

INSOLVENCY PETITION E158 OF 2019

MW MUIGAI, J

NOVEMBER 29, 2021

IN THE MATTER OF KENYA WALKING SURVIVORS SAFARIS LIMITED

BETWEEN

KENYA WALKING SURVIVORS SAFARIS LTD PETITIONER

AND

ROSITA INVESTMENTS LIMITED RESPONDENT

JUDGMENT

- 1 The Petitioner herein filed an Insolvency Petition dated 9th August 2019 and stated the company has been affected by several financial glaring issues and is in receipt of various demands for amounts owing to its suppliers. That the company owes various suppliers sums of money as outlined in the schedule attached to the Petition and is unable to pay its debts. In the circumstances it is just and equitable that the company should be liquidated.
- 2 The Petitioner is a tour company carrying out business in Kenya with a share capital of Kshs.100, 000. The Petitioner's Directors through a resolution dated 1st August 2019 passed a resolution to have the Petitioner liquidated by court by the provisions of the *Insolvency Act*.
3. It was the Petitioner's prayers that;
 - a. Kenya Walking Survivors Safaris Limited be liquidated by the court under the provisions of the *Insolvency Act* No. 18 of 2015.
 - b. An official receiver be appointed as a provisional liquidator.
 - c. Such other order may be made as the Court deems just in the circumstances.

GROUND OF OBJECTION (accessed on-line)



4. The Respondent filed grounds of Opposition dated 16th March 2020 and stated that;
 - a. The Petitioner is guilty of non-disclosure of material facts.
 - b. The Petitioner had already negotiated and committed to an amicable settlement of the owing debt and had paid first instalment.
 - c. The Petitioner has not disclosed to the court of crucial information that will enable court make sound decision.
 - d. The Petitioner has come to court with tainted hands seeking the court to sanitize them,
 - e. The Petitioner continued to incur more expenses while it was aware could not pay and this amounts to offence pursuant to the *Insolvency Act*, 2015.
 - f. Notwithstanding, the Directors of the Petitioner company have been obtaining money using the company and are fighting court cases of fraudulently obtaining money.

5. These Grounds of Objection were supported by the sworn Affidavit of Lencer June Achillah dated 16th March 2020 who stated that;
 - a. The Petitioner has had a working relationship with the Objector's Melili Hotel for some time until 26th September, 2018 when the Petitioner deliberately and intentionally severed the relationship by non-payment of the bills that then amounted to Kshs. 788,950/=.
 - b. The Petitioner changed office location and declined to receive calls from the in charge of the hotel and non-response to our emails especially when it had booked its clients in the hotel and the clients were stranded on next move as it dumped them at the Objector's hotel.
 - c. At some time, the Petitioner booked the visitors in the hotel but failed to connect them to the next destination as agreed with them despite the clients paying fully prior to the visit.
 - d. The Directors of the Petitioner company have been using the company to defraud innocent locals and international people of their hard earned money and now want to run away from liability by winding up the company which the Court should not allow.
 - e. The Petitioner company through its counsel on record had successfully negotiated with the Objector's advocates on record and agreed on the amicable settlement which was payment of monthly instalment of Kshs. 60,000/=.
(Marked "LJA-2" are copies of the correspondences)
 - f. In order to express its seriousness on the issue, the Petitioner paid the first instalment of Kshs. 60,000/ = vide cheque number 000664 drawn on 06/06/2019 by its advocates to the Objector's advocates and now the balance stands Kshs.728, 950. (Marked "LJA-3(a) and (b)" are copies of forwarding letter and cheque)



- g. The Petitioner has not disclosed to the Court the foregoing but instead has sparingly chosen information that favors it and concealed crucial and factual information that can help the Court make a sound judgement.
- h. The Court should not allow the petition before it since it is an abuse of the court process to deliberately and intentionally defraud the objector of its money while the petitioner enriching itself.

PETITIONER'S SUBMISSIONS

- 6. The Petitioner submitted that pursuant to the provisions of Sections 384 and 424 of the *Insolvency Act* No. 18 of 2015, the Petitioner has indicated that there are demands made as against it for payment of monies owed to its creditors and that the value of its assets and profits is less than its liabilities as indicated in its financial statements of accounts for the years 2016, 2017 and 2018 and it is not in a position to pay the said debts. Therefore, it is just and equitable to have the company liquidated. The Petitioner relied on the case of *In re of Ukwala Supermarket (Eldoret) Limited* [2020] eKLR where the court stated;

"I have considered all the evidence provided by the petitioner in the supporting affidavit and I am satisfied that the Company is unable to pay its debt. It is insolvent as its liabilities exceed the available assets. The petitioner has therefore established grounds for liquidation under section 384(2) of the *Insolvency Act*. The only remedy left is for the Court, in light of the circumstances of this case, to order liquidation of the Company pursuant to section 427(1) (c) of the *Insolvency Act*."

- 7. Further, the Petitioner submitted that it has not disputed the amounts owing to the Objector, neither has it failed to disclose to the court the amounts owed to the objector. It has indicated that its business has deteriorated and that the same is incapable of being revived noting that the main company, Thomas Cook which it was relying on to receive clients to run its business went under and further that the current economic status is not viable for the said Tourism business. The Petitioner submits that the Respondent/ Objector is covered by law and that its claim will be considered during liquidation of the company and prays that the Petition be allowed as prayed. In the case of *In the matter of Bizone Limited* [2020] eKLR the court held;

"While the employees have opposed the petition on the ground that they are owed substantial amounts of money and the application is not brought in good faith, I do not see this as reason not to grant an order of liquidation. Their case buttresses the fact that the Company has not been in operation and also owes them money. All the evidence point to the fact that the Company is unable to pay its debts and is insolvent. The employees may have the opportunity to present their claims during the liquidation process. Conversely, any disposal of assets or property will be investigated by the liquidator."

RESPONDENT'S SUBMISSIONS

- 8. It was the Respondent's submission that the Petitioner has approached this Court with not only tainted hands but with minimal truths about the company. By acknowledging that since inception in 2009, it was operating without a professional accountant and was not auditing its books of accounts, it is evident that it was operating in breach of Sections 662, 663, 666, 667 and 668 of the *Companies Act* (2015) requiring each private company to be preparing financial statements annually and presenting to the registrar. Furthermore, the Petitioner by failing to engage a professional accountant to ensure



auditing of its books of accounts contravened Section 709 of the Companies Act that requires annual audits of the financial statement.

9. On whether the Objector is covered, the Objector submitted that the Petitioner did not tell the Court where the other assets went apart from the furniture that was allegedly sold by the landlord. The objector remains vulnerable. As per paragraph 8 and 9 of the objector's affidavit, the petitioner had committed a mode of payment and indeed paid 1st instalment. Hence the Petitioner should be allowed time to pay the money owing.
10. It was the submission of the Objector that the Petition lacks merit, it is driven by bad faith and fraudulent intent to defeat justice by evading to pay the objector for services it benefited from. Hence, the objector urges the court invoke Section 427(4) of the Insolvency Act and decline to grant the prayers in the petitioner with costs and instead direct the petitioner to find alternative means of paying.

DETERMINATION

11. The Court considered the Application, Response to the Application and the Submissions by the parties herein, the issue for determination is whether Section 395 of the Insolvency Act provides:

The voluntary liquidation of a company commences when the resolution for voluntary liquidation is passed.

12. Section 424(1) of the Insolvency Act, sets out the circumstances in which a company may be liquidated by the court and it provides as follows:

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—
 - (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.



13. Section 425 of the [Insolvency Act](#) provides for persons eligible to apply to the Court for liquidation.
- "(a) The Company or its Directors.
 - (b) A creditor or creditors
 - (c) A contributory or contributories of the Company
 - (d) Provisional Liquidator or an Administrator of the Company
14. This is a Petition for voluntary liquidation of the Applicant. The petition is filed by the Director of the company, namely, Otieno Lysaniash Onjwayo. The Petitioner's Directors through a Resolution dated 1st August 2019 passed a resolution to have the Petitioner liquidated by court by the provisions of the [Insolvency Act](#). //(Marked LOO-3)
15. In the petition, it is stated that the company is insolvent and unable to pay its debts. The liabilities owed by the company to its creditors amount to Kshs.2, 681, 430. The company, therefore, seeks liquidation because of its indebtedness and inability to meet its financial obligations to creditors.
16. 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:
- 384(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 favor 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).
17. It was the Respondent's contention that the Petitioner had already negotiated and committed to an amicable settlement of the owing debt and had paid first instalment and that the Directors of the Petitioner company have been obtaining money using the company. Further, that the Petitioner owes the Respondent Kshs.728, 950 having paid Kshs.60, 000. In my view the Petitioner is unable to pay its debts given that it is indebted to the Respondent for over Kshs.100, 000 while also taking into consideration the demand letters from the other creditors as well. There is USD 9180 owed to Samuel Ng'ang'a, USD 67, 000 owed to Zanzibar Ocean Blue Hotel Tanzania and USD 22713 owed to Aviad Horev of Safari World, Israel.
18. 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 Regulations as follows:

- "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."

19. The Petitioner stated that it had received various claims from its creditors. (Marked LOO-2 Copies of the demand letters and the list of creditors). The financial accounts and bank statements were also annexed by the Petitioner. (Marked LOO-1 audited financial statements of accounts from 2016-2018).

DISPOSITION

20. In light of the above I am satisfied that the Petitioner is unable to pay its debts. Having considered the Petition and the supporting documents attached thereof, it is just to grant the orders sought. The petition for liquidation of the Company is granted.

DELIVERED DATED & SIGNED IN OPEN COURT ON 29TH NOVEMBER 2021(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

