



IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY PETITION NO. E165 OF 2019

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

UKWALA SUPERMARKET (ELDORET) LIMITED

JUDGMENT

1. The petition for consideration concerns Ukwala Supermarket (Eldoret) Limited (“the Company”) which was incorporated on 6th December 1999 under the *Companies Act (Repealed)*. Its nominal capital is Kshs. 20,000.00 divided into 200 ordinary shares of Kshs. 100/= each. The objects of the Company are, inter alia, to carry on the business as general merchants and traders, importers, exporters, retailers, wholesalers, distributors, factors, brokers, general and commission agents, manufacturers’ representatives, and to deal in general merchandise and commodities of every description and kind including whether by way of barter, exchange, pledge, sale, purchase or howsoever.

2. The petition in this matter has been brought by one the of the directors of the Company, Anilkumar Khimji Haria. The other directors of the Company are Sandeep Kumar Nemchand Shah, Mansukh Premchand Shah, Shah Rohit Maganlal, Dodhia Vijay Jayantilal and Manish Nemchand Shah. The petitioner states that on 15th October 2019, the Company Board of Directors held a meeting and resolved that the Company be liquidated owing to its insolvency status and inability to pay its debts.

3. The petitioner set out the assets and liabilities of the Company as follows:

Assets

Debtors	Kshs. 1,493,848.00
Furniture, Fixtures & Office Equipment	Kshs. 11,963,894.00
TOTAL	Kshs. 13,457,742.00

Liabilities

General creditors (trade suppliers)	Kshs. 57,495,150.00
Judgment in HCCC NO. 7 OF 2016	
Ukwala Supermarket Limited v	
Jaydeep Shah & Kamal Shah	Kshs. 5,000,000.00
Diamond Trust Bank Eldoret Branch	
(overdraft facility)	Kshs. 1,655,000.00
Prime Bank Limited, Eldoret Branch	

Debenture	Kshs. 4,965,000.00
Prime Bank Limited, Eldoret Branch Loan	Kshs. 24,500,000.00
Employees Terminal Dues	Kshs. 4,048,025.00
TOTAL	Kshs. 97,663,175.00

4. Based on the fact that it is indebted and is unable to meet its financial obligations to creditors including suppliers, employees and banks and that its liabilities far outweigh the assets both fixed and movable, the petitioner prays the Company be liquidated. The petitioner avers that the Company has been making heavy losses due to hard economic times and unfair business competition from other market players.

5. The petition was advertised in the Standard Newspaper on 8th February 2020 and in the Kenya Gazette on 21st February 2020 for hearing on 27th February 2020 but at the time of hearing no creditors or any other parties appeared to support or oppose the petition.

6. Section 384(1) and (2) of the *Insolvency Act* deals with circumstances in 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 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) 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).

7. Section 424(1) of the *Insolvency Act*, set 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.

8. The petitioner is a director of the Company and under **section 425(1)(a) of the *Insolvency Act***, he is entitled to bring this petition. The evidence presented by the petitioner is uncontroverted. 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***.

9. In conclusion, I now make the following orders:

- a. An Interim Liquidation Order be and is hereby issued in respect of the Company, Ukwala Supermarket (Eldoret) Limited;
- b. That the Official Receiver be and is hereby appointed as the Provisional Liquidator of Ukwala Supermarket (Eldoret) Limited;
- c. Cost of the petition shall be borne out of the Company assets.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **FEBRUARY** 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Mr Owala instructed by Gichaba and Company Advocates for the petitioner.