IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

INSOLVENCY PETITION NO. E010 OF 2020

IN THE MATTER OF THE INSOLVENCY ACT, 2015

AND IN THE MATTER OF

MULTIPLE HAULIERS (EA) LIMITED

BETWEEN

SYNERGY INDUSTRIAL CREDIT LIMITED ……...PETITIONER

AND

MULTIPLE HAULIERS (EA) LIMITED ……...RESPONDENT

RULING

Background

1. Synergy Industrial Credit Limited ("the Petitioner") filed a Liquidation Petition dated 3rd March 2020 against Multiple Hauliers (EA) Limited seeking the following reliefs;

a. Multiple Hauliers (EA) Limited be liquidated by the Court under the provisions of the Insolvency Act (Act No. 18 of 2015);

b. The court appoints the Official Receiver who is an authorized Insolvency Practitioner as the Provisional Liquidator.

c. The cost of this Petition be granted to the Petitioner and be paid out of the assets of the Company.

d. Any such other order may be made as the Court deems just in the circumstances.

2. The thrust of the Petition, supported by the verifying affidavit of Jacob Meeme sworn on 3rd March 2020 together with annexed documents, is that the Company entered into two Hire Purchase Agreements with the Petitioner for the purchase of 30 motor vehicles. The Petitioner also entered into a credit facility agreement which was to be secured by a parcel of land; LR NO. MN/VI/4787 CR 46889, Kibarani in Mombasa but the Company failed to provide title to register the charge.

3. The Petitioner stated that the Company breached the terms of the agreements by failing to pay installments. As at 31st January 2020, the sum due was Kshs. 532,090,991.00. It asserts that it does not, nor does any person on its behalf, hold any security on the company's assets for the amount due and that the motor vehicles held as securities have been deliberately dissipated, are of little monetary value and insufficient to secure the debt.

4. The Petitioner states that it had several engagements with the Company through formal meetings and correspondence as evidenced by the Company's letter dated 24th June 2019 where it admitted indebtedness and undertook to pay the arrears in a suggested schedule. That despite this undertaking, the Company did not honour its promise and despite repeated requests, it has failed to pay the debt as proposed. Based on these facts, the Petitioner takes the position that the Company is incapable of paying its debts and now seeks to liquidate the Company.

The Application

5. Following the Petition, the Company moved the court by Notice of Motion dated 5th May 2020 under the provisions of **sections 3(1)(c), 427(1)(a), (b)** and **(d)** of the ***Insolvency Act, 2015*** ("the ***Act***") and **Regulation 10** of the ***Insolvency Regulations, 2019***. The Company therefore seeks the following prayers:

> *a. Spent*
>
> *b. The Petition dated 3rd March 2020 be dismissed with costs.*
>
> *c. In the alternative to prayer 2 above, the court be please to adjourn the hearing of the liquidation petition for 12 months or for such period as the court may deem fit.*
>
> *d. The costs of this application be provided for.*

6. The application is supported by grounds on the face of it as well as the supporting affidavit sworn on 5th May 2020 by Rajinder Singh Baryan, the Company's Chief Executive Officer. The Company admits entering into the Hire Purchase Agreements and the Credit facility as stated by the Petitioner. It depones that 25 trucks and 5 trailers purchased under the Hire Purchase Agreements were jointly registered in the names of the Petitioner and the Company.

7. It contests the Petitioner's averments that it has no security over the Company as inaccurate as the Petitioner has a remedy under the Hire Purchase Agreements to sell the jointly registered vehicles in case of default and as an alternative to pursue the guarantors, which remedies the Petitioner has not pursued. The Company also disputes the Kshs. 532,090,991.00 claimed by the Petitioner. It states that it only owes Kshs. 299,082,245.00 as the excess amount includes penal interest which is disputed.

8. The Company avers that its total debt to all its lenders including the Petitioner was Kshs. 14,253,296,483.00 as at 31st March 2020 hence the Petitioner's debt constitutes only 2.1% of the total debt. It further avers that it has trade receivables worth about Kshs. 6.33 billion and a total asset base in excess of Kshs. 19 billion demonstrating its ability to generate revenue which will be used to settle its debts including the Petitioner's.

9. The Company states that it has reached an agreement with majority of its lenders who have agreed to a short-term Standstill Agreement with regard to the facilities payable by the Company. That pursuant to the Standstill Agreement it has engaged the reputable firm of accountants, PricewaterhouseCoopers to conduct an independent business review of the Company. In addition, the Company is undergoing a restructuring of its operations and has appointed an independent financial adviser who, *inter alia*, is assisting the Company in the management of its cash flow, working capital and liquidity requirements.

10. The Company avers that it employs more than 1500 people directly and liquidating it will have drastic effect on the lives of these employees together with their dependants especially in light of the economic uncertainty occasioned by the Covid-19 pandemic. The Company states that it is performing major contracts in Kenya and the greater East African region demonstrating its ability to continue as a going concern and pay the amounts due.

11. The Company asserts that it has a viable business and is the market leader in the transport and logistics sector in the region and the ongoing restructuring will ensure that it continues as a going concern with the ability to pay the entire body of creditors. That in recognition of this, I&M Bank offered the Company credit facilities by a letter dated 16th April 2020.

12. The Company submits that in light of the foregoing facts, it has made out a case for the dismissal of the Petition and if not, the hearing of the Petition should be adjourned for 12 months to enable the Company to finalize the restructuring of its operations and be in a position to settle the amount owed to the entire body of Creditor including the Petitioner.

Petitioner's Replying Affidavit

13. The Petitioner opposed the application through the replying affidavit of its Legal Officer, Jacob M. Meeme, sworn on 21st May 2020. He contends that the application is frivolous, vexatious and a gross abuse of the court process and geared to undermine the recovery of the credit due from it.

14. The Petitioner questions the Company's proposition that it is a business capable of meeting its financial obligations yet admits to being indebted to the Petitioner for a debt that has not been serviced for 30 months. It further contends that the vehicles were not the only securities. It avers that the Company was to be secured additionally by land parcel; L.R. No. MN/VI/4787 situated in Kibarani, Mombasa but to date the Company has not provided the security or a security thereof.

15. The Petitioner contends that the Company deliberately misquoted its paragraph 11 of the Petition where it contends that the motor vehicles forming a substantial amount of the Company's assets were deliberately dissipated and are unable to stand as security for the debt as they are of little monetary value and incapable of resale as envisioned under Clause 7 of the Hire Purchase Agreement and cannot sufficiently furnish the debt. That a valuation would reveal the actual value of the motor vehicles.

16. The Petitioner states that it served the Company with two demand letters dated 28th October 2019 and 19th November 2019 respectively which the Company did not respond to prompting it to issue the Company with a Statutory Notice dated 15th January 2020 which has not been answered. It further states that the debt due to it is Kshs. 532,090,991.00 as evidenced by the statement of accounts enclosed in the

demand letter of 28th October 2019. It submits that the Company has not shown how it arrived at Kshs. 299,082,245.00 that it owes.

17. The Petitioner further states that the Company had not presented any evidence of its debt portfolio amounting to Kshs. 14,253,296,483.00 or evidence of trade receivables of Kshs. 6.33 billion or evidence of its asset base. It further points out that the Company has not disclosed the Stand Still Arrangement nor sought to have a similar arrangement with it and contends that this is a result of the Company's financial turmoil.

18. The Petitioner submits that the Company has been undergoing financial restructuring for several years and this led to the Petitioner accommodating the Company over that time. It points out a letter dated 4th March 2019 by the Company where it states that restructuring with its principal lenders KCB and NIC Banks has taken longer than anticipated and makes various undertakings to pay the facilities. That the same position was reiterated in a letter dated 16th April 2019. Despite those two letters, the Petitioner states that the Company has falsely raised the issue of restructuring in order to defeat the liquidation petition. That the fact the Company has failed to meet its obligations to its creditors and its current debt portfolio reveals that the business can no longer sustain itself.

19. The Petitioner maintains that it has incurred financial loss as a result of the Company's consistent default and is likely to suffer more harm if the debt is not satisfied.

Creditors Responses

20. Three Creditors filed Grounds of opposition. In the Grounds of Opposition dated 20th May 2020, Faith Mumbua Mutuku states that the application is unmeritorious and untenable because it does not disclose any basis for the court to exercise its discretion in favour of the Company. She states that the issues raised in the Petition have not been adequately dealt with, inter alia, the Company's inability to meet its financial obligations to its creditors upon demand, the Company's total exposure to all its creditors, the financial recompense of the Petitioner and the other creditors who are in support of the Petition and the appointment of an insolvency petitioner as liquidator to manage the Company's affairs. She states that the Company will not suffer any harm, damage or prejudice if its application is disallowed to enable parties be heard at the Petition. She states that the application is dishonest, escapist and an abuse of the court process and is ripe for dismissal with costs.

21. Laura Jean Sylvester in her Grounds of Opposition dated 6th August 2020 states that the application is misconceived, bad in law, an abuse of the court process and devoid of merit as **section 427** of the ***Act*** does not provide for adjournment or dismissal of the Petition before it is heard. She further states that the application does not establish and substantiate any grounds warranting the dismissal and/or adjournment of the Petition for a period of 12 months or such other period as the Court may deem fit. Finally, that the application is contrary to the interest of justice and in the interest of creditors who will be forced to wait for a longer and uncertain period before they can recover the monies owed.

22. Galana Oil Kenya Limited in its undated grounds opposed the application on the grounds that the Company has not disputed the debt or moved to set aside the Statutory Demand. It stated that the Company has not served the Creditors or adduced evidence of the restructuring proposal, it has not exhibited the schedule of its creditors and the sums owing to each, has not exhibited the alleged agreements reached with its creditors. It further states that the application is grounded on hearsay and mere allegations and is without legal and factual basis and is filed with an intention to frustrate genuine creditors from recovering their debts and should therefore be dismissed.

23. Andrew Brymer Belcher, in a replying affidavit sworn on 3rd June 2020 on behalf of Barbara Jane Belcher ("Barbara") by a Power of Attorney dated 7th October 2019 depones that Barbara invested Kshs. 11 million on 14th September 2017 into the Company through Dry Associates Limited and was issued with a Promissory Note No. 1337-161 by the Company of the same date promising to pay the principal amount and interest totaling to Kshs. 12,305,413.68 on date of maturity 13th September 2020. He depones that Barbara was not paid on the date of maturity hence she is an unsecured creditor to the extent. He further deponed that the Company made part payment and by letter dated 19th November 2018 promised to settle the debt without any definite period and has not settled it to date.

24. That having read the Company's application, Andrew Belcher depones that he is satisfied with the Company's receivables and asset base together with supplemental arrangements to obtain financing as well as the current various major contracts within East Africa that are income generating raises reasonable circumstances to stay the Petition to allow the Company reorganize itself to settle the creditors debt. He further depones that it is not in the best interests of the creditors or the Company to liquidate as the Company is seeking to complete corporate execution without a lifeline or second chance which would enable it to trade or obtain financing to clear its debt. He also noted that the Petitioner has not exhausted alternative remedies available to it as secured creditor.

25. Dry Associates Limited ("Dry Associates") relied on the replying affidavit of its Finance Manager, George Otieno, sworn on 21st May 2020. He deponed that Dry Associates in addition to being the Company's creditor was the Sole Arranger and Placement Agent for the issuance of a rolling Short Term Note Program which had a maximum authorized limit, at the time of default, of Kshs.550 million. He stated that the total maturity amount owed on promissory notes subject to the Short Term Note Program between the Company and its creditors is Kshs. 565, 885,435.30 and a further US$ 539,875.77 which the Company does not dispute and most of which matured in 2018.

26. He contended that the corporate restructuring is a mere gimmick and refers to an email sent on 12th October 2018 by Mr Rajinder Singh Baryan where the Company informed Dry Associates that it was undergoing corporate restructuring and would soon be able to pay back its creditors. He deponed that the creditors are apprehensive and that further allusions to restructuring are intended to delay, abuse and make a mockery of the court process and that the same should be rejected.

27. He also pointed out that the Company has not provided any evidence to demonstrate that having reached a Stand Still Arrangement with any of its creditors nor evidence that PriceWaterHouseCoopers has been engaged to conduct an independent business review. Further that the financial statements annexed to the Company's application do not provide full disclosure of the current cash flow position or the current

profit and loss position and that the accounts for 2019 are not audited. He stated that from the evidence, it is impossible to determine the financial health or status of the Company.

28. Mr Otieno further deponed that the Short Term Note Program was guaranteed by a deed of guarantee dated 7th June 2018 with Multiple ICD (K) Limited as the guarantor and the same was to remain in force and effect as long as there was any outstanding or pending obligations. That Dry Associates were forced to issue the guarantor a final notice of default and called on the guarantee, which call has not been replied to nor complied with. That this prompted Dry Associates to file suit to protect the creditors and enforce their rights under **Milimani Law Courts HCCC 419 OF 2018** which is still ongoing.

29. Mr Otieno also depones that failure to pay by the Company resulted in Dry Associates being inundated by calls and emails from disgruntled investors and despite being made aware of its default, the Company has failed to make good on the Promissory Notes. He added that the position that Dry Associates holds is that liquidation of the Company is in the best interests of the Company and its Associates. It adds that in the alternative, the Company ought to pay 50% of what it owes to the creditors under the Short Term Note Program directly within the next two weeks and the balance over a 6-month period.

30. Andrew Ian Moore Gordon swore an affidavit on 29th June 2020 on his own behalf and on behalf of Victoria Wambui Kagunya, Robert James Scott Gordon, Zahra Mohamed Haji Gordon and Margrethe Gordon. He depones that they are the Company's creditors on account of Promissory Notes No. 1337-192 dated 22nd November 2017 and Note No. 1337-211 dated 7th March 2018 which were to mature on 23rd May 2018 and 5th September 2018 respectively which were subject to the Short Term Program between the Company and them. The Company was to pay Robert James Scott Gordon, Zahra Mohamed Haji Gordon and Magrethe Gordon Kshs. 13,215,222.60 and further the Company was to pay him and Victoria Wambui Kagunya US$256,092.64, which interest is still jointly accruing for the past two years.

31. He depones that the application is a gross abuse of the court process filed prematurely to stop the petition being heard on merits. He points out that the Company has failed to adduce evidence of any Standstill Agreement, that it is settling any of its debts or how it intends to settle its debts structurally. He further notes that the Company has not denied the contracts on the Short Term Note Program in the form of the promissory notes which matured over two years ago. He deponed that the Company has failed to prove the existence of any Standstill Agreements with its creditors or that PriceWaterHouseCoopers have been engaged to conduct an independent business review of the Company. He contends that the financial statements annexed to the Company's application are not audited and fail to show the exact financial position the Company is in hence cannot be relied on. Further that the Company will not suffer any harm, damage or prejudice if the application is dismissed to enable parties to be heard during the hearing of the Petition.

32. In a replying affidavit sworn on 28th May 2020 by Evans Ombui, the Acting Manager Registration and Collection of the National Social Security Fund (NSSF), depones that the Company is one of its contributors registered under employer number 00275875 and owes the Fund Kshs. 6,974,620.00 being NSSF employees' contributions and penalties for the period between October 2019 to March 2020. He stated that on 28th April 2020, NSSF issued a formal notice to the Company demanding payment of the outstanding amount within 7 days and the Company is yet to make good its claim and has not engaged the Fund on any proposal for a payment plan to settle the outstanding sum. He stated that NSSF's interest in the matter is to protect the pension savings of members and the Company's employees by ensuring that the outstanding contributions are secured and paid up.

33. He deponed that the grounds for liquidation of the Company had arisen and in light of the orders the court can grant under the ***Act***, the most appropriate would be a conditional order adjourning the liquidation subject to all statutory dues under the ***National Social Security Fund Act*** upto 31st May 2020 be paid up by the Company. He deponed that NSSF is a preferential creditor as the outstanding obligations are statutory in nature and the debt due to it should take precedence in the consideration for liquidation.

34. The Managing Director of Weldcut Africa Limited ("Weldcut"), Eric Omondi, filed a replying affidavit in support of the application sworn on 12th June 2020. He deponed that Weldcut rendered diverse welding and fabrication works on the Company's trucks and machinery since 2017. That on 22nd October 2019, Weldcut sent to the Company its statement of account and demand for payment of Kshs. 7,359,281.00 and advised that any queries regarding the same be raised within 7 days therefrom. Weldcut then issued a formal notice dated 4th November 2019 seeking payment of the outstanding amount.

35. The Company reached out to resolve the dispute by paying Kshs. 400,000.00 by a Bankers cheque dated 26th November 2019. Although the Company stated that it would make good the balance, it failed to do so causing Weldcut to file a suit; **CMCC No. 141 of 2020 Weldcut Africa Limited Vs. Multiple Hauliers Limited** seeking Kshs. 6,959,281.00. Mr Omondi depones that the Company's application for adjournment is well founded and in the best interest of the Company and its creditors. That its prospects of recovering its debt as an unsecured creditor are better when the Company is a going concern as opposed to when the Company is liquidated. He adds that the Petitioner with its instruments and facilities between it and the Company provide sufficient security as an efficient alternative remedy which it has not explored and exhausted. Further, that the debt in the Petition is highly disputed and it would therefore not be in the interest of justice to allow the petition in light of the disputed debt.

36. Nilesh Devani, a director of Ramji Haribhai Devani Ltd ("RH Devani"), swore a replying affidavit on 19th May 2020 in which he deponed that between November 2019 and February 2020, RH Devani supplied the Company with AGO and is indebted to it in the sum of Kshs. 13,290,003.44 which remains unpaid. RH Devani issued the Company a demand letter dated 25th February 2020 upon which the Company responded with a commitment to pay the debt as it was in the process of restructuring the Company with a view to increase its liquidity to settle its financial obligations.

37. RH Devani support's the Company's application on the grounds that the Company made reasonable representations that it has reasonable trade receivables of more than Kshs. 6 billion and total assets of about Kshs. 19 billion which are adequate to settle all its financial obligations. It is also satisfied that the Company has explained and reasonably demonstrated that it is currently running major contracts not only in Kenya but in the greater East Africa and it therefore has the ability to continue running as a going concern while servicing its financial responsibilities into the foreseeable future. It therefore states that the Petition is premature and a draconian measure to be used a

measure of last resort.

38. In a Replying Affidavit sworn on 9th June 2020 by Rajinder Billing, counsel for Hardev Kaur Dhanoa, a Judgment Creditor in **NKU HCCC No. 4 of 2013 Hardev Kaur Dhanoa (Suing as the Legal Representative of the Estate of Harminder Singh Dhanoa) v Multiple Hauliers (EA) Limited**. He deponed that Judgment was entered on 27th April 2007 and the claim against the Company now is for the costs and interest amounting to Kshs. 2,683,466.00 and interest due on the costs from 31st May 2017 at 12% per annum amounting to Kshs. 966.929.99 making an aggregate sum of Kshs. 3,650,395.99. He depones he issued a demand letter dated 20th May 2020 to the Company but the sum remains unpaid to date.

39. Mr Billing states that there are sufficient grounds for confirming the Company's trade receivables and asset base and appears well founded and that the Court should give due consideration to the fact that the Company is currently undertaking major contracts within East Africa that are income generating and allow the Company's application to give the company reasonable time to reorganize itself in order to settle its debts. He states that it would be more prudent and reasonable to allow the Company's application and that the prayers sought in the application are more appropriate and practical viable option taking into account the Covid-19 Pandemic and economic uncertainty afflicting the country.

40. Mr Billing further depones that the Petition offends the policy objective of the ***Act,*** is made in bad faith and is an abuse of the court process considering that the debt is substantially disputed. He asserts that liquidation is a drastic and final blow to a company that leaves no chance of survival and the same should be a final resort when the Court is satisfied that there are no alternative remedies. In his view, administration would be more appropriate. He depones that the Petition is not in the best interests of the creditors or the company and only seeks to put the Company on its deathbed yet there are several options still available. He adds that the Petitioner is a secured creditor and its debt constitutes security to its debt which the Petitioner has not made any effort or taken legal steps available to it to recover the security or guarantees to satisfy the disputed claim. He supports the Company's plea that the Petition be stayed for 12 months and in the event the Petition is allowed the same should be on condition that the Company gives its creditors a scheme or reasonable proposal to pay its debts within 6 months, in default thereof the Petition proceeds for determination.

41. I & M Bank has filed a replying affidavit sworn on 19th May 2020 by its Manager in the Legal Department, Andrew K. Muchina. He deponed that the balance sheet provided by the Company as at 31st March 2020, showed that the Company had trade receivables of about Kshs. 6.33 billion and a total asset base in excess of Kshs. 19 billion demonstrating its ability to generate revenue which will be used to settle its debts. He deponed that a Company is unable to pay its debts if it is commercially insolvent, which was not the case here. He further deponed that a liquidation petitioner should not be sustained where the debt is disputed such as the case herein. That liquidation is a drastic measure which would prejudice the creditors and Company employees yet the Company has demonstrated its ability to continue as a going concern. It is on the basis that the Company was a going concern that I & M Bank offered it credit facilities vide letter dated 16 th April 2020. Mr Muchina pointed out that the Petitioner holds security whose current value they have not shown that if disposed by the Petitioner may preclude the need for the present proceedings. He stated that the Petitioner should pursue its securities or the guarantors.

42. NCBA Bank Kenya PLC filed a replying affidavit sworn on 18th June 2020 by Stephen Atenya, its Senior Legal Counsel, in the Legal, Governance and Company Secretarial Division. He deponed that he was authorized to swear the affidavit on behalf of NCBA Bank, KCB Bank, Cooperative Bank and Barak Fund SPC Limited ("Participating Lenders"). He deponed that around March 2019, MG Holdings Limited requested the Participating Lenders to enter into a Standstill Agreement, namely a grace period on the repayment of the outstanding facilities which had been extended to it and its subsidiaries Multiple Hauliers (EA) Limited, Multiple Hauliers ICD (Kenya) Limited and Multiple Solutions Limited (collectively referred to as "the Group"). This was in order to provide it sufficient time to turn around the business and return it to a position that would ensure it is able to pay its debts.

43. That after negotiations and discussions for close to a year, the parties executed a Standstill Agreement on 17th March 2020 by the individual companies which form part of the Group on the one hand and the Participating Lenders on the other. He pointed out that the participating lenders account for about 87% of the Company's debt. He deponed that the key elements of the Standstill Agreement were that even though the Participating Lenders were owed significant sums of the money, they would;

a. Not require the Group to repay the principal or interest to the participating lenders in respect to existing indebtedness

b. Suspend enforcement of their rights against the Group under various facilities which were in default for the period of the standstill (6 months), pending the proposed restructuring of the Group. That this would be in order to provide the Group sufficient breathing space and significant funds to reinvest into its business to help turn its business around.

44. He further deponed that the other terms of the Standstill Agreement were that;

a. The Company, on its own and on behalf of the Group, has requested the Lenders to enter into a standstill arrangement with respect to the existing facilities of the Company ("Existing facilities") while it seeks to implement the "proposed restructuring".

b. The "proposed restructuring" means;

i. The proposed sale of non-core assets of the Group or any of the Group's shareholders (or their affiliates) to generate funds to support the business operations of the Group.

ii. The identification of a strategic investor to inject additional equity capital into the Company and/or any member of the Group and the issuance of such amount of new shares to the investor as shall be equivalent to such investment.

iii. Appointment of a CFO as may be considered necessary by the Group to oversee and if need be, reconstitute the Group's finance

function/personnel.

iv. Procurement of additional funding for the Group's operations including by way of additional debt on terms satisfactory to the Participating lenders.

v. Restructuring of the Group and/or financial indebtedness of the Group (to reduce the amount of existing debt) and such other matters as may be considered by the participating lenders to be necessary to achieve a turnaround of the Group's financial and trading condition for the long term, which may include the sale of assets or businesses of the Group.

c. The Standstill Period, as defined in the agreement is for a period of 6 months unless terminated earlier in accordance with its terms and may be extended by the participating lenders (in their sole discretion) for a further period of 6 months (or such other longer period).

d. The coordinating banks are the NCBA Bank and KCB Bank.

e. During the Standstill period, no member of the Group shall without the prior written consent of the participating lenders;

i. Repay any amount to any lender which has the effect of reducing the amount to that lender to less than the amount due to that lender as at the calculation point.

ii. Amend the terms of the existing facilities, create any encumbrance upon all or any part of its assets or properties, transfer, sell, lease or assign any rights or dispose of or create an equitable interest in all or any part of its assets, subject to the terms of the Standstill Agreement.

iii. Take any action which has the intention, desire or effect of putting any lender into a better position as against any other lender that it was at the calculation point.

iv. Enter into any transaction with any person except on an arm's length terms and for full market value.

v. Pay any dividend or make any distribution to shareholders

vi. Make any substantial change to the general nature of its business from that carried on at the date of the Standstill Agreement.

vii. Make any payments (whether through a single transaction or as a series of transactions) exceeding in aggregate Ksh.40 million to any third party including creditors, landlords, suppliers, utility providers, service providers etc.

f. During the Standstill period the Company shall

i. Complete to the satisfaction of the coordinating banks each of the milestones set out in the standstill agreement by the relevant date listed in Schedule 4 to the agreement. The milestones inter alia include

a. Completion of an independent business review.

b. Appointment of an independent financial adviser with a mandate to oversee and if need be, reconstitute the Group's finance function/personnel and assist the Group with the management of its cash flow, working capital and liquidity requirement.

c. Implementation of corporate governance interventions including appointment of two independent non-executive directors.

d. Sale of non-core assets.

e. Equity investment.

f. Appointment of a CFO.

ii. Update the participating lenders on a weekly basis through the Coordinating banks on the status of each of the milestones listed in the agreement.

iii. Ensure each member of the Group complies with its statutory obligations including but not limited to relevant tax authorities and social security authorities to avoid accumulating penalties and fines.

45. Mr Atenya further deponed that it was a term of the Standstill Agreement that some of the Participating Lenders would provide a fuel guarantee facility of USD 4 million to the Company to enable it to purchase fuel on more favourable terms and thereby keep the Group's fleet of vehicles moving together with an insurance premium finance facility of Ksh.174 million to meet the cost of the outstanding insurance premiums as the Group's insurance policies were at risk of being cancelled.

46. He further deponed that the relevant participating lenders have already issued a USD 2 million bank guarantee to Vivo Energy Kenya Limited and the other fuel suppliers nominated by the Company to guarantee the payment obligations of the Company to the fuel suppliers. This is in addition to the sum of Kshs. 135,985,280.00 already disbursed to the Company's insurers, Kenindia Insurance to facilitate payment of the outstanding insurance premiums for the year 2019/2020.

47. It was his deposition that the Standstill Agreement provided foundation for the Company to implement the proposed restructuring of its business operations. He deponed that the Company was aware that:

a. The participating lenders have advanced new monies to the Group to provide it with much needed liquidity

b. The Group has not paid any principal or interest in respect of its existing facilities to the participating lenders since the executing of the Standstill Agreement.

c. The Company has already appointed an independent financial adviser to assist it to strengthen and oversee its management and financial function.

d. The Group's bank mandates have been amended.

e. The Participating Lenders are keenly monitoring the utilization of the fuel guarantee facility and the Company's liquidity position even as turnaround options are being considered.

f. An independent business review for the company and the Group has already been commissioned by the Participating Lenders and completed. The recommendations contained therein will form a basis for the formulation of a restructuring plan for the Group.

g. The Company is engaging with its other significant creditors to request that they join the Standstill Agreement. Such a request has been extended to the Petitioner.

h. The Company is currently formulating a comprehensive restructuring plan for the Group that will provide a solid basis for the turnaround of its business and the payment of its secured and unsecured creditors – key milestones and timelines will be included in the plan.

i. The Company has appointed a firm of corporate governance specialists to advise the Group on corporate governance interventions such as adoption of Board Charter and appointment of independent non-executive directors to the Board of the Company.

j. The Group has already commenced a process to facilitate the sale of some of its significant non-core assets including certain real estate and shares

k. The Group is working towards satisfying the rest of the milestones as set out in the Standstill Agreement and has evinced firm commitment to a successful turnaround of the business.

48. It was the Participating Lenders position that given time and opportunity, there is a strong likelihood that the Company will undergo a successful turnaround and maintain itself as a going concern and return to profitability and meet its financial obligations to all its creditors. Further that if the liquidation proceedings are allowed to continue, then the efforts to turn the Company around will be adversely affected thereby eliminating any real prospects of the creditors recovering their monies. That the Standstill Agreement and the proposed restructuring are more efficacious alternatives to liquidation and the application was merited.

Issues for determination

49. The parties have filed written submissions in support of their respective positions mirroring the arguments presented in their depositions. They have also cited numerous authorities. The issues for determination that flow from the application, depositions and submission are two-fold: first, whether the Petition should be dismissed and if not, whether the hearing of the Petition should be stayed for 12 months or for such period as the court may deem fit.

Determination

50. Consideration of the application proceeds from the well settled jurisprudence that a liquidation is a death warrant for the Company. Indeed, in ***Matic General Contractors Limited v Kenya Power and Lighting Company Limited*** **[2000] eKLR,** Kwach JA termed it as "*corporate execution*". On the other hand, there is the general principle that the court should be slow to strike out a petition. In ***Brahmbhatt v Dynamics Engineering Limited*** **[1986] KLR 133**, the Court of Appeal expressed the view that, "*In an application to strike out a winding up petition, the court should consider whether on the evidence, it is a plain and obvious case for striking out and whether the petition was bound to fail."*

51. These principles do not exist in a vacuum as the ***Act*** sets out the policy framework under which the High Court is to exercise its jurisdiction to supervise insolvency proceedings. **Section 3(1)(c)** thereof is apposite and states that:

3(1) The objects of this Act are-

(c) In the case of insolvent companies and other bodies corporate whose financial position is redeemable-

i. enable those companies and bodies to continue to operate as going concern so that ultimately they may be able to meet their financial obligations to their creditor in full or at least to the satisfaction of those creditors; and

ii. to achieve a better outcome for the creditors as a whole than would likely to be the case if those companies and bodies were liquidated.

52. Before I proceed to consider the substance of the Company's application, I think it is important to dispel any notion about the court's jurisdiction. Under **section 423(1)** of the ***Insolvency Act***, only the High Court has jurisdiction to supervise the liquidation of companies registered in Kenya and in that regard, **section 427** goes on to state that

427 (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:

(a) an order dismissing the application;

(b) an order adjourning the hearing, conditionally or unconditionally;

(c) an interim liquidation order; or

(d) any other order that, in its opinion, the circumstances of the case require.

53. Although the aforesaid provisions seem to suggest, as counsel for the opposing creditors have submitted, the court can only exercise those powers at a hearing, the inherent power of the court to entertain any interlocutory applications which is incidental and ancillary to the jurisdiction to "*supervise liquidation*" cannot be gainsaid. The power to entertain applications other than the hearing of the petition is an inherent and necessary power of the court to do justice to the parties and to prevent an abuse of the court process. In ***Re Ukwala Supermarkets Limited*** **[2019] eKLR**, Kasango J., expressed the view that:

In any Petition brought for the purposes of liquidating a Company, the Court has the discretion, once the Petitioner has established a right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein, the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.

54. I would even go further and hold that "*hearing of a liquidation application*" under **section 427(1)** of the ***Act*** encompasses the hearing of interlocutory applications, giving directions and doing all things that go into processing the liquidation application to its conclusion. The fact that the court can entertain an interlocutory application does not deprive the parties to the right to a fair hearing. Even at that stage, the court is obliged to give the parties an opportunity to present their respective positions. In this case, the creditors, both opposing and supporting, have filed depositions and submissions stating the positions in response to the application. I therefore find and hold that the court has jurisdiction to entertain the Company's application.

55. Turning to the substance of the application, the main consideration is whether the Petition stands on its own merit. It is contended that the debt owed by the Company is a disputed debt. The Company admits that it owes Kshs. 299,082,245.00 but insists that the outstanding amount claimed by the Petitioner includes penal interest which is contested. The opposing creditors support the Company by arguing that this is a contested debt in law hence the liquidation petition must be stopped in its tracks as the insolvency court is not a forum for resolving such debts.

56. The jurisprudence that a liquidation petition cannot be founded on a contested debt has been reiterated in many cases including ***Kenya Power and Lighting Company Limited v Matic General Contractors Ltd*** **NAI CACA No. 26 of 2001 (UR)**. In ***Universal Hardware Limited v African Safari Club Limited*** **MSA CACA No. 209 of 2007 [2013] eKLR**, Makhandia JA., giving the lead judgment of the Court of Appeal, summarized the position regarding striking out a petition on account of a disputed debt as follows:

The principle as I understand it is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.

After analyzing several decisions including ***Mann v Goldstein*** **[1968] 2 All ER 769**, ***Crusair Limited v CMC Aviation Ltd (No. 2)*** **[1978] KLR 131** and ***Re: Global Tours and Travels Limited*** **[2001] 1 EA 195**, the learned Judge concluded that:

The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.

57. This is a case where a valid statutory notice was served on the Company making a formal demand dated 15th January 2020. I did not see a formal contest to the demand and as the Petitioner rightly points out, the contention was not supported by any evidence. In ***Prideinn Hotels and Investments Limited v Tropicana Hotels Limited*** **MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR**, Visram JA., reading the majority judgment of the court, had this to say;

[38] This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to

pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

58. Moreover, there is evidence that there had been discussion between the Petitioner and the Company which had not borne fruit and the Petitioner has remained unpaid for a long time. In this respect, I am of the same view as Tuiyott J., in ***Kitmin Holding Limited v Noble Resources International PTE Limited*** **HC COMM No. 179 of 2017 [2018] eKLR** where he observed as follows in declining to restrain the presentation of a petition where the Company had made unfulfilled promises to pay the debt:

[30] This chronology of events demonstrates that the debt has been outstanding from, at least, 30th December 2014. This would be 28 months before the Statutory Demand was issued. The Creditor has indulged the Plaintiff on several occasions. The Plaintiff has neither paid the debt nor made proposals on how to secure it. Given the overall circumstances of this case, is the Creditor to pursue recovery of this undisputed debt through Arbitration or a Civil Suit or further negotiations? I am afraid I cannot find Prima Facie evidence that the conduct of the Defendant in pressing on with the Liquidation of the Plaintiff is improper or oppressive or intended to achieve a collateral or malicious purpose.

59. The Petition is also opposed on the ground that the Petitioner is a secured creditor who has recourse to the motor vehicles that are securities under the Hire Purchase Agreements as such it should exercise alternative remedies to realize the securities other than presenting this petition as a means to pressure the Company to settle the debt. Reliance was placed on the case of ***Mohammed Yusufali and Another v Bharat Bhardwaj and Another*** **[2007]** eKLR in which the court cited with approval the case of ***In the matter of Leisure Lodge Limited*** **ML WC No. 29 of 2006 (UR)** and stated as follows:

The court held that where there are found to be alternative remedies, the petitioner is not entitled to a winding up order. The judge in that case stated "in my judgement the petitioner is and will be acting unreasonably if he turns round to reject his own proposal to have the price for his shares determined in whatever forum customarily available for the determination of such matters and the value of shares". The judge specifically found that the petitioner had alternative remedy namely to go to arbitration on the issue of the price at which the respondent was to buy his shares in the Company. That because the petitioner had this alternative remedy, the learned judge concluded that the petitioner would not in the circumstances be entitled to a winding up order as prayed for in his petition.

60. While I agree with the principle, I think that case is distinguishable as it was a case of dispute between majority and minority shareholders. On the other hand, the dicta in the ***Prideinn Hotels and Investments Limited v Tropicana Hotels Limited*** **(Supra)** makes it clear that the court may make a liquidation order despite the existence of alternative remedies. That issue may well be resolved at the hearing of the petition. The Petitioner complains that the debt due to it from the Company has been outstanding since 2017 and as far back as June 2019, in the letter dated 24th June 2019, the Company admitted indebtedness and committed to pay monthly instalments but has failed to do so. The only contest that the Company now raises is that the sum claimed is inclusive of the interest due. It does not give particulars of how this sum is inconsistent with the agreements its signed with the Petitioner. On this basis I cannot say that the debt is disputed on bona fide and substantial grounds.

61. The Company's substantial ground for seeking to dismiss the petition is that the majority of its creditors being the participating lenders, that is the Banks, holding over 87% of its total debt, are opposed to the liquidation. The thrust of this submission is that the majority creditors have confidence in the viability of the Company and ready and willing to support its revival which in the long term would be for the benefit of all creditors. Counsel for the Company relied on several authorities including ***Re Genport Limited*** **[1996] IEHC 34** where the court held as follows:

I think it is highly significant, and it is a matter which I am entitled to take into account under Section 309 of the Companies Act, 1963, that the Company is still trading successfully and that four trade creditors, being the only trade creditors who have appeared in this Petition, all are opposed to granting the winding up order. They clearly believe that it is in their interests as ordinary creditors that the Company should continue to trade …. the fact that a winding up may not be of any real benefit to ordinary creditors are sufficient to persuade me to exercise my discretion in refusing to make the winding up order.

62. The Company also cited the case of ***Re P & J Macrae Ltd*** **[1961] 1 All ER,** where the Court held as follows;

On a petition for compulsory winding up of a company by a creditor prima facie entitled to such an order, the court has discretion under S.346 (1) of the Companies Act, 1948 whether to grant or to withhold the order and the bare fact that the opposing creditors are a majority is not sufficient of itself to entitle them to have the order refused, though, when the majority of creditors opposed for good reason, their opposition should prevail in the absence of proof by the petitioner of special circumstances rendering the winding up desirable.

63. Counsel for the Company also referred to the ***Palmer's Company Law (24th Edition)*** at P. 1369 which summarized the principle applicable that:

In accordance with this, the court will normally give effect to the wishes of the majority. It takes into account the numerical majority as well as the majority in value but the latter carry greater weight. Opposing creditors should state the reasons for their opposition. The court will investigate whether the reasons are good. A good reason has been held to be that there was, "fair, possible and reasonable chance" of obtaining payment without winding up.

64. That the Company is undergoing financial difficulties is not in doubt. It is also a matter of fact that this court is entitled to take judicial

notice that the COVID-19 pandemic has affected business generally and in particular the kind of business the Company is engaged. At the stage, I would like to agree with Counsel for the opposing creditors, the Company had provided insufficient evidence of its case for consideration of adjournment of the petition. However, the supporting creditors, who are entitled to be heard, provided material upon which this court may appreciate the totality of circumstances.

65. The question the court must answer is whether the Company if supported, will remain a viable business entity. The majority of the opposing creditors, who hold 87% of the Company's debt, are sufficiently invested in the revival of the Company as demonstrated by Mr Atenya's deposition whose contents I have outlined above. There is also evidence that Company has a total asset bases of about Kshs. 19 billion and receivables of about Kshs. 6 billion which are sufficient to support a viable company and generate revenue in the long term. I & M Bank has provided a line of credit based on the ability of the Company to support those facilities. These facts cannot be wished away and I find sufficient evidence of restructuring supported by the lenders.

66. Have the supporting creditors put forward special circumstances which would cause the court to ignore the wishes of the majority creditors? The court is alive to the fact that the unsecured creditors have not been paid for long time. Whether they will be paid now or in the future is uncertain. One of the key issues raised by the creditors supporting the Petition is that 87% of the creditors are all secured and the court should ensure that they should not be disadvantaged on that account. They complain that their interests have not been taken into account and their interests prejudiced by the Standstill Agreement.

67. The Commercial Paper Holders complain that the Participating Lenders have executed the Stand Still Agreement which provides that they shall not be paid without consent of the Lenders except as required by court. In their view, the court should reject any proposal that clearly disadvantages any set of creditors in the rescue process. They submit that **section 427(d)** of the ***Act*** grants this court power to make any orders that its deems fit and just in the circumstances and in exercise of this jurisdiction, the court should make such orders that take into account the interests of the unsecured creditors in light of the objectives of the ***Act***.

68. I have not found the Petition entirely frivolous and for that reason I refuse to dismiss it. I have also considered the view of the majority creditors and the evidence that the Company business prospects may be revived. I have also taken into account the view of the unsecured creditors and in this respect I find the observations of the Court of Appeal in Singapore in ***BNP Paribas v Jurong Shipyard Pte Ltd*** **[2009] SCGA 11** appropriate in the circumstances:

> *[19] Where a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non petitioning creditors, as well as the company's suppliers, customers and shareholders. These are interests that the court may legitimately take into account in deciding whether or not to wind up the company. In* ***Pilecon Engineering Bhd v Remaja Jaya Sdn Bhd [1997] 1 MLJ 808****, the High Court of Malaysia said, at 813 (in respect of a creditor's petition to wind up a company), that* ***"[n]ot only should the court consider the interest of the creditors, the court should also consider the interest of the public at large" [emphasis added].*** *There, the petitioner had obtained judgment against the respondent company, which was in the business of developing residential property. In staying the petition for a period of one year, the court took into account the fact that the majority of the unsecured creditors were opposed to the winding up, and added (ibid) that:*
>
> > *Recovering an abandoned housing project is akin to injecting life into the community in that area. Out of that one project much benefit could accrue to the community. Schools will emerge, public utilities will be provided and the general upliftment of life will no doubt bring harmony and contentment, thus nurturing a satisfied society. If another opportunity can be given to the [receivers and managers] to revive this abandoned project, so be it.*

69. By its own application, the Company left the option for adjournment of the petition in the hands of the court. I have no doubt that this court has power to adjourn the hearing of the petition in order to achieve the objective of the ***Act***. Such power has been exercised in other jurisdictions with similar provisions as those in the ***Act*** in order to give the creditors an opportunity to consider restructuring proposals and explore the possibility of reviving the company. For example, in ***Re Bank of Credit and Commerce International SA*** **[1992] BCC 83**, the court allowed an adjournment of petition to winding up BCCI despite opposition from the petitioner to allow a majority of shareholders to consider restructuring proposals. This is what the court stated:

> *The truth of the matter, as far as I can see, is that if any substantial recovery is to be made by the creditors of BCCI as a whole, worldwide, the best and possibly only hope is the restructuring proposals which may be put forward by the government of Abu Dhabi. To stand in the way that possibility is not to serve the interests of the depositors of this company as a whole but to approach the matter on an insular basis …..… In addition there are major, possibly impossible, tasks of research to be done to try and disentangle what has happened in BCCI. The estimate of duration of such inquiries of six months does not seen to me to be in any way inordinate. It is necessary, as it seems to me, to provide sufficient time for that to be done.*

70. The Company and a majority of its creditors by their own initiative have invested heavily in ensuring that the Company remains a going concern and turns around its financial situation. This is further evidenced by the fact that I&M Bank offered the Company credit facilities vide letter dated 16th April 2020. It is in the best interests of the Company and the creditors that it be granted time and opportunity to follow the course chartered out for itself together its majority creditors in order to ensure the Company turns around. I will also be remiss if I did not acknowledge that the Company is a large employer and is performing large contracts within East Africa region. Collapse of the Company would affect more than the creditors.

71. The court has the power to grant the adjournment on such terms as it deems fit. At this stage the court lacks sufficient material upon which to engage with the terms of the Standstill Agreement and the circumstances of restructuring. This is not to say that the court is unconcerned with the interests of the unsecured creditors. I have looked at the Standstill Agreement and it has provisions which require the Company to formulate a comprehensive restructuring plan that will provide a solid basis for the turnaround of its business and the payment of its secured and unsecured creditors.

72. The Standstill Agreement was consummated in March 2020 after a year of negotiations between the Company and Participating Lenders. It's conception and negotiation pre-dated the presentation of the petition hence it was not made in anticipation of these proceedings. There is also evidence that the petitioner was invited to participate in the negotiations but it did not do so. Further, the Agreement does not close the door to the interests of the unsecured creditors. Under the Agreement, a financial consultant has now been engaged for a period 12 months. This period appears reasonable to enable the financial consultant to carry out its task.

73. In my view, the granting of the adjournment should be on condition that the Company engages the unsecured creditors. It should provide an update on its progress and financial position in that regard in a period of 6 months.

Disposition

74. I therefore allow the Notice of Motion dated 5th May 2020 and order as follows:

(a) The hearing of the petition herein is adjourned for period of 12 months from the date hereof.

(b) The Company is directed to engage all the unsecured creditors in formulating its restructuring plan.

(c) The Company shall file within a period of 6 months from the date hereof an updated plan which shall include a plan to settle its indebtedness to the unsecured creditors.

(d) The costs of this application shall be in cause.

DATED and **DELIVERED** at **NAIROBI** this **18th** day of **SEPTEMBER** 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Ms Asli instructed by Ahmednasir, Abdikadir and Company Advocates for the Petitioner.

Mr Mwihuri instructed by Hamilton, Harrison and Mathews Advocates for the Respondent/Company.

Mr Gachugi instructed Hiram Christopher Advocates for Faith Mumbua Mutuku (Creditor)

Mr Bowry instructed by Bowry and Company Advocates for Laura Jean Sylvester (Creditor)

Mr Muthama instructed by KTK Advocates for Galana Oil Kenya Limited (Creditor)

Mr Litoro instructed by Litoro, Omwebu Advocates for the Barbara Jane Belcher (Creditor)

Mr Oyugi instructed by Nyamongo and Company Advocates for Dry Associates Limited (Creditor)

Hussein Hibo and Associates instructed by Andrew Ian Moore Gordon, Victoria Wambui Kagunya, Robert James Scott Gordon, Zahra Mohamed Haji Gordon and Margarethe Gordon (Creditors)

Mr Gicheha instructed by Kiptiness Odhiambo and Company Advocates for National Social Security Fund (Creditor)

Mr Amalemba instructed by Amalemba and Company Advocates for Weldcut Africa Limited (Creditor)

Mr Billing instructed by R. Billing and Company Advocates for Hardev Kaur Dhanoa (Creditor)

Mr Waigwa instructed by Wamae and Allen Advocates for I &M Bank (Creditor)

Mr Nyaburi and Ms Ogula instructed by Iseme Kamau and Maema Advocates instructed by NCBA Bank Kenya PLC, KCB Kenya Ltd, Co-operative Bank of Kenya Ltd and Barak Fund SPC Ltd (Creditors).

Mr Mwangi instructed by Julius and Company Advocates for R. H. Devani Limited (Creditor)

Ms Abuya instructed Walker Kontos Advocates for Prima Bank Limited (Creditor).

Ms Ndirangu instructed by Mix Telematics and Mix International (Creditor)