



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

INSOLVENCY CAUSE NO. 14 OF 2016

IN THE MATTER OF: KIPSIGIS STORES LIMITED

AND

IN THE MATTER OF: THE INSOLVENCY ACT, 2015

IN THE MATTER OF: THE COMPANIES ACT (CAP, 486), LAWS OF KENYA (NOW REPEALED)

JUDGMENT

1. I have before court petition by M/s Mea Limited ("*Creditor*") petitioning this court that a Liquidation order be made in respect of **M/s KIPSIGIS STORES LIMITED** hereinafter called "*the company*" of P.O. Box 574-20406 Sotik Township, Garage Road, Sotik within the jurisdiction of this court.

2. The "*Creditor's*" petition prays that **M/s KIPSIGIS STORES LIMITED** "*the company*" be liquidated by court under the provision of the **Insolvency Act, 2015** and that the Official Receiver be appointed the provisional liquidation of the said company. The creditor's petition is supported by an affidavit of Joseph Kimani Waweru dated 13th June 2016, the Finance and Administrative Manager of the creditor, who deponed that the statements in the petition marked "A" relating to the dates and deeds of the creditor to be true.

3. In the instant petition, M/s Kipsigis Stores Ltd were initially represented by M/s Kiplangat & Associates, who sought the petition to be struck out, but the court declined to do so through the ruling dated 12th May 2017; provoking the Advocates for the M/s Kipsigis Stores Ltd to file an application to cease acting. The Application was on 29th September 2017 allowed. M/s Kipsigis Stores Ltd have since then been served in person including today's hearing through an affidavit of service dated 22nd June 2018 and filed on 22nd July 2018 but have not been taking active participation in this petition.

4. In this petition, it has been submitted that the petition is based on admitted debt. The creditor made a statutory demand dated 5th January 2006. M/s Kipsigis Stores Limited made admission of the debt in the sum of Kshs. 99,458,143/90 through a letter dated 8th September 2015.

5. During the hearing of the petition the counsel for supporting creditors appeared and urged the court to grant the creditor's petition. The counsel appeared for the following supporting creditors:-

a. Nic Bank Ltd	76,159,411/47
b. KCB	241,187,662/96
c. Elgon Kenya Ltd	10,843,313/80
d. Bamburi Cement Ltd	67,494,619

6. In the instant application, no one is said to be holding any security in respect of the money owed by M/s Kipsigis Stores Ltd nor it appear at the hearing. The court was left in darkness as to whether all the creditors' debts are unsecured. There is no evidence on whether the company is in position, in which it has insufficient funds and assets to meet its liabilities.

7. It is however clear that due to company's inability to pay its debts as they all fall due the supporting creditors supported, the creditor petitioner's prayer for a liquidation order against the company.

8. The creditor petitioner states it do not nor does any person on its behalf hold any security on the said company, or any part thereby, for payment of the sum owed and that the amount owed by the company is within the prescribed liquidation level in accordance with the Insolvency Act and Rules; and that the company is unable or has no reasonable prospect of paying the debt.

9. It is further urged that there is no application seeking to set aside the statutory demand of the debt owed to the creditor petitioner by the company since the issuance of the statutory notice and since then 21 days has lapsed.

10. Section 384 (1) (2) of the Insolvency Act deals with circumstances in which a company is declared as being unable to pay its debts. The section provides:-

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).

11. The statutory notice having been served upon the company on 15th January 2016 and the company having previously admitted the indebtedness, and having failed to pay the debt or secure or compound for it to reasonable satisfaction of the creditor within 21 days from the date of statutory notice, it is my finding that the company is unable to pay the debt as defined under the above-mentioned section.

12. Section 424 of the Insolvency Act, set out the circumstances in which company may be liquidated by the court. It is provided under the said section as follows:-

"424. 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 (1) (b) of the Insolvency Act provides:-

"425. An application to the Court for the liquidation of a company may be made any or all of the following:-

(a)

(b) A creditor or creditors (including any contingent or prospective creditor or creditors)."

14. Having referred to the above sections, I will now turn to the question as to whether I should make an order for liquidation of the company as sought by the creditor petitioner or not.

15. The creditor petitioner has proved to the required standard of proof that it is a creditor for the purposes of part IV of the Insolvency Act. The creditor has through her application and annexures therein established that it had supplied goods to the company at company's request and goods were not fully paid for even after demand and admission of the indebtedness in writing by the company. The company has not challenged the claim nor bothered to appear after several services with hearing notices after its Advocates ceased acting for it.

16. The petitioner had demonstrated that statutory demand was issued for the purposes of section 384 of the Insolvency Act. The notice was not honoured provoking this petition. The debt has been admitted. There is no dispute over the indebtedness neither has the company challenged or contested the petition. The supporting creditors filed respective notices of intention to appear on the petition indicating that they are creditors in respective of respective sums as indicated in the notices. The company similarly did not bother to dispute or challenge the indebtedness to any of the supporting creditors. I therefore find the petitioner and the supporting creditors established that the company is unable to pay the debts. I further find and hold the petitioner has discharged the burden of proof as required by law.

17. There is no evidence that was tendered as to the company assets, if any, whether they match liabilities.

18. In view of the above I am satisfied that under section 384 of the Insolvency Act 2015, the prayers sought in the petition are meritorious.

19. The upshot is the petitioner's Application is successful. I accordingly enter judgment as follows:-

a. The company Kipsigis Stores Ltd is hereby to be liquidated under the provisions of the Insolvency Act, 2015.

b. The costs of the petition are to be paid to the creditor/petitioner, and supporting creditors out of the assets of the company.

c. The official Receiver is to be constituted as the liquidator of the company.

Dated, signed and delivered at Nairobi this 26th day of July, 2018.

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J .A. MAKAU

JUDGE.