



REPUBLIC OF KENYA



In re Liquidation of Put Sarajevo General Engineering Company Limited (Insolvency Petition E020 of 2020) [2025] KEHC 296 (KLR) (Commercial and Tax) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 296 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E020 OF 2020
H NAMISI, J
JANUARY 23, 2025
IN THE MATTER OF THE INSOLVENCY ACT, NO. 18 OF 2015
AND
IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015
AND
IN THE MATTER OF THE LIQUIDATION OF PUT
SARAJEVO GENERAL ENGINEERING COMPANY LIMITED

IN THE MATTER OF
HAMILTON HARRISON & MATHEWS PETITIONER

JUDGMENT

1. By Petition dated 26 June 2020, the Petitioner filed a Liquidation Petition under section 425 of the [Insolvency Act](#) seeking the following orders:
 - i. That the Court makes an order for the liquidation of Put Sarajevo General Engineering Company Ltd;
 - ii. And make such orders as may be necessary and just;
 - iii. The costs of the Petition be provided to the Petitioner out of the assets of the Company in priority.
2. The Petition is accompanied by the Official Receiver's Certificate of Compliance dated 7 July 2020.



3. The Petitioner's case is that the Company is indebted to the Petitioner in the sum of Kshs 2,691,250/= and Kshs 3,137,450/= in respect of the Petitioner's Bills of Costs, being monies owed to the Petitioner for legal services rendered to the Company. A statutory demand dated 17 March 2020 was served upon the Company, calling upon the Company to pay the said sum.
4. Despite being served, there was no response to the Petition, thus a judgement date was fixed. However, before the judgement was delivered, the Respondent filed an application dated 2 November 2020 seeking to have the petition struck out for violation of Regulation 77 B(2)(a) of the Insolvency Regulations, 2016 and that the statutory demand dated 17 March 2020 be set aside and/or vacated. In its Ruling dated 31 March 2022, the Court ordered that the proceedings of 1st October 2020 be set aside and that the petition be heard on merit. That was the only time that the Respondent participated in these proceedings.

The 2nd Creditor

5. By Notice of Motion dated 14 April 2023, M/s Arrow Cars Limited applied to be enjoined as a Creditor in the Petition. The Application, which was not opposed, was allowed as prayed.
6. The 2nd Creditor's claim is that on several occasions and in the course of business between the period of 19 June 2017 and 17 January 2018, the 2nd Creditor supplied tyres to the Respondent, on credit basis. The Respondent failed to fulfil its contractual obligations by failing to pay the outstanding balance of Kshs 2,986,000/= owed to the 2nd Creditor. Consequently, the 2nd Creditor filed a suit (Milimani CMCC No. 7788 of 2018 – Arrow Cars Ltd -vs- Put Sarajevo General Engineering Company Ltd) against the Respondent for recovery of the monies, which suit was determined in favor of the 2nd Creditor and judgement entered for the sum of Kshs 2,986,000/= together with costs and interest at court rates from the date of filing suit. As at 30 January 2023, the Respondent's debt to the 2nd Creditor stood at Kshs 4,839,580.85.

The 3rd Creditor

7. By Notice of Motion dated 18 April 2024, National Bank of Kenya Ltd applied to be enjoined as a Creditor in these proceedings. The Application was unopposed, and was subsequently allowed by the Court.
8. The 3rd Creditor's claim is in respect of credit facilities extended by the 3rd Creditor to the Respondent Company by way of various registered securities. The facilities comprised of standard overdraft/ temporary overdraft facilities, asset finance, bonds and guarantees and were largely extended to the Respondent for purposes of working capital requirements, with respect to various civil construction projects that the Respondent company was undertaking primarily in favor of the Kenya Rural Roads Authority (KERRA) and Kenya National Highways Authority (KeNHA).
9. These facilities were secured. As at 12 March 2019, the 3rd Creditor's claim against the Respondent was for Kshs 876,411,073.62.
10. The Petition was canvassed by way of written submissions. The 2nd and 3rd Creditors opted to rely on the submissions filed by the Petitioner. In their submissions, the Petitioner made reference to a Replying Affidavit by the Respondent dated 31 October 2022, opposing the Petition. This Replying Affidavit is neither in the court file nor on the virtual filing platform.



Analysis and Determination

11. I have considered the pleadings filed by the Petitioner, the evidence on record by the Creditors and the submissions by the Petitioner. The issue for determination herein is whether a liquidation order should issue against the Respondent.
12. As determined by the Court in its Ruling on 31 March 2022, service was properly effected upon the Respondent. The Respondent did not file any response to the Petition. It is not disputed that the Petitioner has a valid claim against the Respondent for a total sum of Kshs 5,828,700/= as a result of legal services rendered to the Respondent. There is no evidence before this Court that the Respondent settled or attempted to settle the said debt by paying the Petitioner the entire or part of the sum owed.
13. The 2nd and 3rd Creditors have equally presented sufficient evidence before this Court of their debts against the Respondent. The 2nd Creditor presented a decree for the sum of 4,839,580.85 as at 9 February 2023 issued against the Respondent in Milimani CMCC No. 7788 of 2018. There was no evidence adduced to show that the said decree was set aside, varied and/or stayed by a court of competent jurisdiction.
14. The 3rd Creditor presented statements of the Respondent's account held with the 3rd Creditor, indicating an overdue amount of Kshs 876,411,073.62 as at 12 March 2019.
15. In re James Maina Kabatha (Debtor/Applicant) NKR Insolvency Cause No. 4 of 2019 [2020] eKLR, the Court opined thus:

“The twin goals of consumer or individual bankruptcy law are to protect creditors and ensure optimal payment to them where possible; and the provision of shelter and a “fresh start” to individual debtors overburdened by debt.’ The learned judge adds that:

3. The “fresh start” goal is accomplished through the bankruptcy discharge, which usually releases the debtor from personal liability from certain debts and prevents creditors from taking any action against the debtor to collect those debts.
 4. Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to these seemingly conflictual twin goals of bankruptcy law – the protection of creditors and the provision of fresh start for the honest but unfortunate debtor -- is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and disclose all his financial information.
 5. It is only upon meeting this double threshold – demonstration of good faith and full disclosure of all financial information – that a Petitioner can become entitled to a bankruptcy order. The architecture and structure of the *Insolvency Act* and Insolvency Regulations, 2018 reinforce these double threshold for individual Petitioners.”
16. Section 424 (1) of the *Insolvency Act* provides for instances when a company may be liquidated by the court. These are:
 - 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* (Cap. 486); 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
17. The Petitioner seeks an order for liquidation to be made as against the Respondent on grounds that the latter is unable to pay its debts. Section 384 of the *Insolvency Act*, provides the circumstances in which a company may be deemed as being unable to pay its debts:

- “(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).
- (3). The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).”

18. On the basis of the evidence, I find that there is sufficient evidence that the Respondent is unable to settle its debts. In the case of *Pride Inn Hotels and Investments Limited v Tropicana Hotels Limited* [2018] eKLR, the Court of Appeal had this to say on the issue of liquidation:

“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.” (emphasis added).

19. In view of the foregoing, I find that there is sufficient evidence to grant the prayers sought. The Petition is hereby allowed and I make the following orders:
- i. Put Sarajevo General Engineering Company Ltd is hereby declared insolvent and is hereby liquidated under the provisions of section 424 (1) (e) of the *Insolvency Act*;
 - ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed as the Liquidator of the Respondent’s properties;
 - iii. Costs of the Petition shall be borne out of the Respondent’s assets.

DATED AND DELIVERED AT NAIROBI THIS 23 DAY OF JANUARY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

..... for the Petitioner

.....for the Respondent Company

.....for the 2nd Creditor

.....for the 3rd Creditor

..Ms. Libertine Achieng..... Court Assistant

