



**Mashaba v Genghis Capital Ltd (Insolvency Cause E077 of 2024)  
[2025] KEHC 2099 (KLR) (Commercial and Tax) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2099 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E077 OF 2024**

**A MABEYA, J**

**FEBRUARY 6, 2025**

**BETWEEN**

**AUSWELL MASHABA ..... PETITIONER**

**AND**

**GENGHIS CAPITAL LTD ..... RESPONDENT**

**RULING**

1. This is a ruling on the petitioner's Motion on Notice dated 15/5/2024. The petitioner's Motion was brought under sections 427(1)(c), 437 and 692 of the *Insolvency Act*, sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* and Order 40 of the *Civil Procedure Rules*.
2. The petitioner sought to restrain the respondent, its agents, subsidiaries and associate companies from disposing off, selling or charging, leasing out its assets or paying out money from its bank accounts. It further sought an interim as the interim liquidator.
3. The Motion was supported by the affidavit of Auswell Mashaba sworn on even date. The grounds for the application were that; the petitioner obtained a decree against the respondent for USD 2,950,000 and interest at the rate of 7.25% p.a from 15/10/2020 in Milimani HCCC No. E 780 of 2021 on 18/10/2021. The debtor failed to honor the terms of the consent and has similar not liquidated the sum.
4. The petitioner contended that the respondent intentionally avoided the enforcement of the decree so as to strip off its assets. That the debtor was registered on 10/8/1994 and has nominal share capital of Kshs.716,600,740/=. That the respondent was in the process of stripping its assets with the intention of defeating the said decree.



5. That the respondent had been served with the statutory demand on 4/4/2024 to which the respondent had raised an objection. That unless the orders sought are granted, the petition will be rendered nugatory as the respondent would empty out its assets without paying the petitioner.
6. The application is contested by the replying affidavit of Edward Wachira sworn on 29/5/2024. It was contended that the application was premature as the respondent had filed an application dated 6/5/2024 seeking to set aside the statutory demand. That the question of the solvency or otherwise of the respondent has not yet been determined.
7. That the respondent is an investment bank duly licenced by the Capital Markets Authority with an investment portfolio of Kshs. 2b with 152,000 active investors. That the order to restrain the respondent from accessing its accounts would have far reaching consequences as it will affect its operations as it requires to invest and pay its investors regularly.
8. That it was wrong to seek to affect the operations of its associate companies and subsidiaries as it contravenes the principle of separate personality for each entity. That the respondent is involved in the sale and purchase of properties with the proceeds thereof being applied for the benefit of its investors. That granting the orders sought would be counter-productive as the respondent is a solvent company. That in any event, there were garnishee proceedings that were pending in the main suit.
9. The application was canvassed by way of written submissions which the Court has carefully considered. The petitioner submitted that the application to set aside the statutory demand was served on 21/5/2021 after the present application had already been filed.
10. That the allegation that the debtor paid USD 1.5m was unsupported. That only USD 406,000 had been paid and the debtor failed to fulfil its obligation to settle Kshs.1.5m as per the consent orders. That the true test was whether there was a bona fide dispute about the debt which has not been discharged by the debtor. That the debtor was served with the statutory demand and had also become a company that was unable to pay a debt under section 384 (1) of the *Insolvency Act*. The case of *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies vs. Twiga Properties Ltd* 2022 KEHC 12 KLR was relied on in support of those submissions.
11. That the appointment of a liquidator is a remedy that is available and is meant to protect the assets of the company where it is demonstrated that a winding up order would be issued. That the debtor engages in robust capital market business and has not paid the debt. That it also demonstrated that the assets were being disposed without settling the petitioner's decree.
12. The debtor submitted that the allegations that its assets were being dissipated was unsupported. That the email referred to was inadmissible as an electronic certificate should have been produced alongside the email. The case of *R vs. Barisa Wayu Matuguda* [2011] eKLR was cited in support of those submissions.
13. That the application had been filed when the garnishee application in HCC No. E780 of 2021 was still pending and determines similar orders on similar grounds. That the application was premature since the debtor's solvency is yet to be determined.
14. That the debtor was licensed by the Capital Markets Authority with a portfolio of 152,000 active investors with a portfolio of Kshs. 2b. That innocent 3<sup>rd</sup> party investors and the wider banking sector would be negatively affected if the orders sought were issued.
15. That the value of the assets exceeded the debt and the debtor had made substantial payments to offset the outstanding debt as per annexure Ew 2 (b) and Ew3. The payments were made pursuant to the



- consent entered on 14/11/23. That the debtor was not insolvent and that liquidation of the company would be draconian. Reliance was placed on the case of *Re Ukwala Supermarket Ltd* 2019 eKLR.
16. Finally, it was submitted that the Court has discretion to suspend the proceedings to enable the parties agree on a framework to settle the outstanding. Reliance was placed on the case of *Xplico Insurance Co Ltd vs. Musyimi Paul Manmi t/a Maingi Musyimi Associates Advocates* 2020 eKLR.
  17. I should point out here that although the parties seem to have submitted globally on the 3 applications in this matter, ie. the Motion dated 6/5/2024 to set aside the statutory demand, Motion dated 15/5/2024 for injunction and 22/5/2024 for discharge of the interim injunction, the application for consideration is that for injunction. That is the one on which directions had been given.
  18. This is an injunction application. The applicant has to satisfy the principles enunciated in the case of *Giella vs. Cassman Brown*. These are that; demonstrate a prima facie case with a probability of success, that he will suffer irreparable damage that cannot be compensated by an award of damages and that if the Court is in doubt, it will determine the matter on a balance of convenience.
  19. Several matters are not in dispute. These are that, the respondent is indebted to the petitioner for a substantial sum which has not been liquidated, that the debt arises from a consent judgment entered in HCCC No. E780 of 2021, that there has been attempts to execute the said decree without success, that there is pending before that case a garnishee application, that a statutory demand was duly served upon the respondent and there is pending an application to set the same aside.
  20. It is on that background that the petitioner came to Court alleging that while the respondent is indebted to it, it was involved in actions of stripping the assets of the company with a view to defeat the said decree. That all efforts to recover the debt had failed.
  21. Firstly, the Court observes that there is jurisdiction in a proper case to grant an injunction in insolvency proceedings under section 692 of the *Insolvency Act* in order to safeguard the assets of a company. Secondly, there is also jurisdiction to appoint an interim liquidator in a proper case. The question for this Court is whether this is a proper case to exercise those jurisdictions.
  22. These proceedings were commenced by way of the statutory notice dated 26/3/2024. The next step would have been the lodging of a liquidation petition. That did not happen because the respondent did challenge the said statutory demand by its Motion dated 6/5/2024.
  23. In the view of this Court, the pendency of that application means that the solvency or otherwise of the company has not been considered and it would be premature to appoint an interim liquidator. It would be presumptuous to do so. Such jurisdiction is exercised where there is clear evidence that a company is insolvent. That is not the case here. The application to set aside the statutory demand must be dealt with first.
  24. On injunction, I do not think a case for the same has also been established. This is because, firstly, the allegations that the respondent was stripping its assets were not proved. Allegations based on mere belief are not enough. The same must be accompanied by evidence. In any event, the respondent stated that its business included buying and selling properties for the benefit of its investors. The Court is therefore not satisfied that the respondent was involved in actions that were detrimental to its creditors.
  25. Secondly, there are garnishee proceedings that are pending before the main suit in another Court. Those proceedings are execution in nature. They are meant to sequester accounts of the respondent and recover debts owed to it by either its bankers or its other debtors. I think it will be wrong at the



same time to freeze the respondent's accounts in these proceedings while those garnishee proceedings are still pending.

26. The view the Court takes is that, let the challenge to the statutory demand be dealt with first before and other and further proceedings can be undertaken in these proceedings.
27. Accordingly, I find the application dated 15/5/2024 to be without merit and hereby dismiss the same with costs. With this outcome, the application by the respondent dated 22/5/2024 becomes moot. Let the parties list the Motion dated 6/5/2024 for hearing.

It is so ordered.

**SIGNED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY, 2025.**

**A. MABEYA, FCI Arb**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**F. GIKONYO**

**JUDGE**

