



**Pride Drive Limited v Adrian Kenya Limited (Insolvency Petition E038 of 2023)
[2025] KEHC 2002 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2002 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E038 OF 2023**

PM MULWA, J

FEBRUARY 13, 2025

BETWEEN

PRIDE DRIVE LIMITED PETITIONER

AND

ADRIAN KENYA LIMITED RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 30th October 2023 on the grounds that:
 - a. That this court lacks jurisdiction to entertain the Petition dated 13th June 2023 pursuant to Clause 16 of the Car Rental Agreement
 - b. That the aforesaid Clause provides that any dispute be referred to arbitration.
 - c. That the Petition is an abuse of the court process and a waste of judicial time.
2. Filed together with the Preliminary Objection (PO) was a Replying Affidavit dated 30th October 2023. The Respondent urged the court to dismiss the Petition for want of jurisdiction.

Respondent's submissions

3. The Respondent while citing the Court of Appeal case in Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd (2017), submits that courts should respect and uphold the terms of contracts between parties, especially where arbitration clauses are present, unless coercion, fraud, or undue influence are proven.
4. The Respondent urged the court to honour the arbitration clause in the contractual agreements in line with Section 6 of the *Arbitration Act* and refer the matter to arbitration denying that prayer would amount to rewriting the contract inappropriately.



Petitioner's submissions

5. In response to the PO the Petitioner filed submitted that by filing the replying affidavit the Respondent waived its right for arbitration and as such this court is clothed with the jurisdiction to determine the Petition.
6. The Petitioner argues that the PO is flawed because it contravenes Section 6 of the *Arbitration Act*. The petitioner emphasizes that the case is a winding-up petition, governed by the *Insolvency Act* and relevant provisions of the *Companies Act*. Winding-up is a statutory remedy available to creditors seeking to recover debts.
7. The Petitioner asserts that the issue of winding up a company is not addressed in the contractual agreement and, therefore, cannot be subject to arbitration. It is further contended that an arbitrator lacks the jurisdiction to grant winding-up orders, as such powers are exclusively within the purview of the High Court.

Analysis and determination

8. The primary issue for determination is whether this court has jurisdiction to entertain the Petition, given the existence of a clause in the contractual agreement referring disputes to arbitration.
9. The principles governing POs were succinctly stated in the landmark case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, thus:

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point, may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. For a PO to succeed, it must raise a pure point of law, it must not require the court to ascertain facts through evidence, and the objection, if successful, must be capable of disposing of the entire matter.
11. In the instant case, the Respondent has raised a Preliminary Objection challenging the jurisdiction of this court based on Clause 16 of the contractual agreement, which required all disputes to be referred to arbitration.
12. The question of jurisdiction is a pure point of law, as established in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where the court held:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. I am guided by the principle of ‘party autonomy’ which is a cornerstone of arbitration. Section 6 of the *Arbitration Act* states:

“A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies...refer the parties to arbitration unless it finds—



- a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
 - b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.”
14. It therefore follows that agreements to arbitrate disputes must be respected unless there are exceptions established.
15. In the present case, the Petition seeks the liquidation of the Respondent on the grounds of an outstanding debt amounting to Kshs. 3,557,814.85, which remains unpaid despite the issuance of a statutory demand under the *Insolvency Act*, 2015.
16. I am aware of the fact that winding up or liquidation of a company is statutory in nature and governed by the *Insolvency Act*, 2015. Section 424 of the *Insolvency Act*, 2015, specifies the grounds for winding up by the court, including the inability of a company to pay its debts. Section 384 further defines a company's inability to pay its debt.
17. The issuance of a statutory demand and its subsequent non-compliance by the Respondent are legal prerequisites for instituting liquidation proceedings. These proceedings are a statutory mechanism to protect creditors, employees, shareholders and other stakeholders, and are inherently public in nature. Arbitration, being a private dispute resolution mechanism, cannot usurp the court's jurisdiction in such matters (see *Newton Muthee Thiong'o v Karatina University* [2021] eKLR).
18. The Petitioner cited the case in *Cecilia Wacuka Nganga v Bernadus Nganga Kamau & Another* [2016] eKLR, where it was held that:

“A winding-up cause is not attributable to arbitration. The jurisdiction to wind up companies is conferred by statute and is a matter of public interest.”
19. In *Nairobi Winding Up Cause No.18 of 2009 In the Matter of Kangwana Investments Company Limited*, the court held as follows:

“The Application dated 25th February 2011 lacks merit for two reasons. First, the winding up cause is not arbitrable and secondly, the clause relied upon by the Applicant does not warrant the reference of the issues herein to arbitration.”
20. In the instant case, the Petitioner issued a statutory demand for Kshs. 3,557,814.85, which the Respondent neither settled nor set aside. The failure to set aside the statutory demand under Section 384(2) of the *Insolvency Act* signifies an admission of insolvency by the Respondent. Consequently, the Petitioner is within its rights to file a liquidation Petition in court.
21. It is trite law that once a statutory demand is issued and not set aside, the court is seized with the jurisdiction to determine the liquidation Petition. In *Indigo Garments (EPZ) Ltd v Apex Apparels (EPZ) Ltd* [2020] eKLR, the court noted:

“A statutory demand that is not set aside within the prescribed period creates an automatic presumption of inability to pay debts, and the creditor is entitled to commence liquidation proceedings before the court.”



22. Thus, I find that the Respondent having been served with the statutory demand and having failed to set it aside, the court became seized with the statutory jurisdiction to entertain the Petition. This jurisdiction cannot be ousted by an arbitration clause.
23. In view of the foregoing, I find that this court has jurisdiction to hear and determine the Petition, as the matter relates to the winding up of a company. I thus find that the Preliminary Objection dated 30th October 2023 is without merit and is hereby dismissed with costs to the Petitioner.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

P.M MULWA

JUDGE

In the presence of:

Mr. Muriuki for Petitioner

Mr. Ong'anya for Respondent

Court Assistant: Carlos

