



Big Cold Kenya Limited v Afro-American Food Company Limited (Insolvency Petition E058 of 2021) [2025] KEHC 3139 (KLR) (Commercial and Tax) (13 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E058 OF 2021**

PM MULWA, J

MARCH 13, 2025

BETWEEN

BIG COLD KENYA LIMITED PETITIONER

AND

AFRO-AMERICAN FOOD COMPANY LIMITED RESPONDENT

JUDGMENT

1. The Petitioner/Creditor filed an insolvency petition dated 9th August 2021, seeking liquidation of the Respondent/Debtor. The Petitioner contends that the Respondent is insolvent, thus unable to pay the debt owed to it. This claim is based on the Respondent's failure to settle outstanding invoices for services provided, which amounts to Kshs. 9,682,402.33. The Petitioner argues that the Respondent's insolvency is apparent, and it is therefore necessary for the court to determine whether liquidation is an appropriate remedy.
2. The Petitioner asserts that on 13th December 2019, a Service Level Agreement (SLA) was entered into with the Respondent, and subsequent invoices totaling Kshs. 9,682,402.33 were issued for services rendered. Despite this, the Respondent has failed to pay the debt, and the Petitioner issued a statutory demand on 9th July 2021. The statutory notice, a crucial procedural step in insolvency matters, was allegedly ignored by the Respondent. The Petitioner relies on this statutory demand and the failure of the Respondent to make payment or secure the debt to argue that the Respondent is insolvent.
3. In its defence, the Respondent opposed the petition through the replying and supplementary affidavits of Francis K. Muia, Group Financial Controller, sworn on 8th November 2022 and 9th June 2023. The Respondent disputes the debt and the existence of the claimed amount of Kshs. 9,682,402.33, asserting that only two invoices were issued, which were paid. The Respondent denies having received



goods corresponding to the disputed invoice number 2434, which forms part of the debt claimed by the Petitioner.

4. Furthermore, the Respondent contends that the statutory demand was not properly served and that it has not been properly substantiated. The Respondent also raises a procedural issue, asserting that the service agreement included a provision mandating arbitration as the dispute resolution mechanism, which the Petitioner failed to follow. Additionally, the Respondent asserts its solvency, stating that it operates several fast food restaurants and is able to meet its financial obligations.
5. The petition was heard through affidavit evidence and written submissions which the parties filed.
6. I have carefully considered the petition and the opposition thereto by the Respondents alongside the submissions and arguments put forth by the parties.
7. The central issue to be determined in this case is whether the Petitioner has sufficiently demonstrated that the Respondent is unable to pay the debt claimed and whether the liquidation petition is proper before the court.
8. Section 384(1) of the *Insolvency Act* sets out situations when a debtor is deemed unable to pay its debts. The situations are:
 - 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.
9. And sub-section 2 thereof provides that 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).
10. It is evident from the above provisions that there are several mechanisms by which a creditor may establish a company's inability to pay its debts. The key provision in this case is Section 384(1)(a), which requires a creditor to serve a statutory demand on the debtor and for the debtor to fail to comply within 21 days. The statutory demand was duly issued by the Petitioner, and the Respondent contends that it did not receive the statutory notice. However, this Court, in its ruling of 14th July 2022, had previously established that the Respondent was duly served with the statutory demand. This was evidenced by a chain of email correspondence between the parties, which confirmed the receipt of the notice by the Respondent. As such, the Respondent's failure to comply with the demand for payment remains a significant factor in this Court's determination of insolvency.
11. The Respondent, however, disputes the existence of the debt and argues that it is not liable for the amount claimed by the Petitioner. It further contends that the matter at hand arises from a breach of the SLA between the parties, which contains an arbitration clause. The Respondent seeks to have the matter resolved through arbitration, as stipulated in the agreement.
12. It is well-established in law that the Petitioner bears the burden of proving that the Respondent is insolvent under the provisions of Section 384 of the *Insolvency Act*. In order to meet this burden, the



Petitioner must demonstrate that they are indeed a creditor of the Respondent, and that the debt in question is owed and remains unpaid.

13. The evidence presented by the Petitioner is compelling. It shows that the Petitioner supplied 312 beef burger patties to the Respondent at the Respondent's request. Because the goods were perishable, the Petitioner incurred additional charges for storing and preserving the items. Despite this, the Respondent only took 11 beef burger patties, leaving the remainder behind. As a result, the Petitioner has incurred further expenses in trying to preserve the remaining goods. This evidence establishes the existence of a debt owed by the Respondent, which has not been settled.
14. However, the Respondent disputes the amount claimed and asserts that the goods were not received as alleged by the Petitioner. In light of these disputes, the Respondent has argued that the dispute is one that should be resolved by arbitration. The existence of an arbitration clause in the SLA cannot be overlooked. Under normal circumstances, where parties have agreed to resolve disputes through arbitration, it is prudent for the Court to refer the matter to arbitration per the agreement between the parties.
15. It is important to emphasize that a winding up petition is not an appropriate way for resolving a disputed debt, neither should a winding up petition be used as a machinery to try common law action (see *Re Tanganyika Produce Agency Limited* HCMCC No. 6 of 1957 [1957] EA 241).
16. In the same vein, the decision in *Re Hoima Ginners Ltd (No 2) Kampala HCCC No 3 of 1964* [1964] EA 439 remains instructive. The court held that:

“ A petitioning creditor seeking a winding up order founded on unliquidated damages should first establish with certainty what the quantum of damages is and must make himself a creditor by changing his claim into a judgment before he can petition. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed by the company. A petition will be dismissed, and under circumstances may be stigmatized as a scandalous abuse of the process of the court.”
17. It is trite law that a winding up petition should only be allowed to proceed if the debt is clear, due and owing, and if no legitimate dispute exists regarding the amount owed.
18. In this case, I am inclined to agree with the Respondent that the dispute arises from an alleged breach of the SLA. Given that the agreement contains an arbitration clause, it would be more appropriate for the parties to resolve the dispute through arbitration. As the Respondent's inability to pay the debt is contested and is tied to an unresolved contractual dispute, this Court cannot proceed with the winding-up petition at this stage.
19. I find that the winding-up petition it has been brought inappropriately in the context of a disputed debt.
20. In conclusion, the petition for winding-up dated 9th August 2021 is unmeritorious and constitutes an abuse of the process of the Court. The same is dismissed with costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 13TH DAY OF MARCH 2025.

PETER M. MULWA

JUDGE

In the presence of:



Ms. Wangila h/b for Mr. Kuyo for Applicant

Ms. Olembo for Respondent

Court Assistant: Carlos

