



Elmarak Holdings Limited & another v Afrikon Limited (In Liquidation) (Insolvency Cause E018 of 2020) [2025] KEHC 3593 (KLR) (Commercial and Tax) (20 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3593 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E018 OF 2020**

F GIKONYO, J

MARCH 20, 2025

BETWEEN

ELMARAK HOLDINGS LIMITED 1ST APPLICANT

OFFICIAL RECEIVER 2ND APPLICANT

AND

AFRIKON LIMITED (IN LIQUIDATION) RESPONDENT

RULING

1. Before me are two applications.
2. One is dated 31st January 2024 and the other, 11th September 2024 by the official receiver and petitioner respectively. I will refer to them as the Official Receiver's and Petitioner's applications, respectively.

Official Receivers Application dated 31st January 2024

3. The application is brought under, Section 433 of the *Insolvency Act*, 2015, Section 3 & 3A of the *Civil Procedure Act*, Section 4 & 29 of the *Contempt of Court Act*, 2016.
4. The official receiver seeks orders to compel the respondent company to furnish its statement of financial position within 14 days together with an inventory of the assets both fixed and moveable owned by each company within two (2) years preceding the date of filing the liquidation petition.
5. The official receiver also prays that upon failure to comply, the court be pleased to either issue warrants of arrest against the respondent under the *Contempt of Court Act*, 2016 or fine them in accordance to Section 433(8) & (9) the *Insolvency Act*, 2015.



6. The application is grounded on the annexed affidavit sworn by the Assistant Official Receiver, Sylvia Githungo on 31st January 2024.
7. The gravamen is that the respondent's director has disregarded, wilfully neglected and/or ignored the numerous requests for the Statements of Financial Position which has crippled the liquidation process.

Petitioner's application dated 11th September 2024

8. The is brought under Sections 504(1), (2), (6) & (7), and 509 of the *Insolvency Act*; Regulation 10 of the Insolvency Regulations 2016; Order 16 Rule 6 of the Civil Procedure Rules 2010; Sections 140, 143, 144, 145, 146 & 148 of the *Companies Act* 2015.
9. The petitioner seeks an order for the examination of the conduct of the respondent's shareholders and directors Sammy Maina Kamau of Kenyan National Identity Card Number 22227679 and Mike Woosun Jung of Korean Passport Number M56246330 in relation to the transfer of the Tender NIB/DRP/023/2018-2019 from the respondent to Jilk Construction Company Limited and any payments arising thereof as well as any other asset which belongs to the respondent during the course of the liquidation process.
10. The petitioner also seeks that following the examination the said directors are:
 1. found personally jointly and severally liable for all the debts incurred by the respondent and payable to the creditors
 2. declared as delinquent directors and directed to repay the total sum of money diverged from the respondent's; contribute fifty percent (50%) of the total sum of money diverged from the respondent's assets as compensation for the misfeasance and breach of both statutory and fiduciary duties.
11. The grounds for the application have been set out in the application and the supporting affidavit sworn by the petitioner's managing director, Jinaro Kipkemoi Kibet on 11th September 2024.
12. The major grounds are that; after the commencement of the liquidation proceedings on 25th August 2020, the respondent changed its ownership and directorship and assigned its assets to Jilk Construction Company Limited, without notifying the court and the creditors. That the change in ownership and directorship were aimed at fraudulent trading, conversion of the assets and monies of Afrikon Limited to evade payment of debts to its Creditors which ought to be investigated.
13. It was deposed that the respondent assigned its only known asset, Tender NIB/DRP/023/2018-2019, to Jilk Construction Limited. It was also deposed that Jilk Construction Limited has had tax assessment made by the Kenya Revenue Authority in respect to monies received from diverting funds from Debtor Company as determined by the Tax Appeals Tribunal in Tax Appeal 1436 of 2022 Jilk Construction Company Limited v Commissioner of Legal Services & Board Coordination [2024] KETAT 1012 (KLR).
14. The applications are unopposed.

Hearing

15. On 20th February 2025, Ms. Muthoni appeared for the petitioner. There was no appearance for the Official Receiver. Mr. Otieno appeared for the 10th Creditor, Mr. Mutugi for Mr. Wawire for Eco Bank, Mr. Kang'ethe for Kang'ethe & Co. Advocates, Mr. Mwendwa for Apex, Ms. Wamuyu for Regal Equipment. They all indicated that they do not object to the applications.



Analysis and determination

16. The first issue is: Whether the official receiver has made a case for the orders to compel the respondent's directors to submit to the Official Receiver, the company's statement of financial position and inventory of assets.
17. The official receiver may require a company or its officials to submit a statement of affairs relating to the company. Failure to provide the statement of affairs is a punishable offence. Section 433 of the *Insolvency Act* reads in part that: -
 - “ 433. If the Court has made a liquidation order or appointed a provisional liquidator
 - (1) in respect of a company, the Official Receiver may require some or all of the prescribed persons to make out and submit to the Official Receiver a statement of affairs relating to the company.
 - (8) A person who, without reasonable excuse, fails to comply with an obligation imposed by or under this section commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings.
 - (9) If, after being convicted of an offence under subsection (8), a person, without reasonable excuse, continues to fail to comply with the relevant obligation, the person commits a further offence on each day on which the failure continues and on conviction is liable to a fine not exceeding fifty thousand shillings for each such offence.”
18. The official receiver exhibited Gazette Notice No. 9089, dated 7th July 2023, through which it published the Notice of Appointment of Liquidator and called for the first creditors' meeting of the company. It also exhibited a copy of the official search from the Registrar of Companies showing that James Githenji Maina was the only shareholder director of the company as of 10th November 2023.
19. The official receiver further exhibited letters dated 9th November 2023, 13th December 2023 through which it requested the directors to provide a Statement of Financial Position. It also exhibited email correspondence between it and the company's current and former directors and shareholders. Through an email dated 22nd June 2023, sent to Mike Jung via mike.jung@afrikon.net the official receiver requested for a statement of affairs of the company. Mike sent a response through jungwoosun@gmail.com that he was no longer a director so the notice could be sent to Sammy Maina Kamau.
20. There was no opposition to the official receiver's application by the respondent's directors. The evidence exhibited shows that the official receiver requested for the statement of affairs of the respondent company to no avail. Thereon, I find that the official receiver has made out a case for the order to compel the respondent's directors to furnish the statement of affairs within 14 days and in default, issuance of warrants of arrest against them.
21. The second question is whether the petitioner has satisfied the court to issue an order for the investigation into the conduct of the respondent's directors.
22. The liquidation proceedings commenced on 25th August 2020. The petitioner exhibited a copy of a contract dated 4th June 2019 between the respondent and the National Irrigation to show that it was awarded the Tender No: NIB/DRP/023/2018-2019 for the sheet piling an associated Kora Kora intake works for Bura Irrigation and Settlement Scheme Rehabilitation Project. It also produced copies of



- the respondent's Certificate of Incorporation, CR 12 and Certificates of Registration showing that the sole shareholder and director was Mike Jung Woonsun as of 24th August 2018.
23. The petitioner also exhibited letters dated 27th January 2022 and 28th February 2022 by Woosun Jung to its advocates to the effect that:
- i. Afrikon changed its ownership structure by introducing Sammy Kamau as a nominee shareholder.
 - ii. The said Sammy Kamau had been diverting money meant for Afrikon through Jilk Construction Company Limited a company wholly owned and operated by Sammy Kamau by assigning the contract won by Afrikon to itself.
 - iii. The assignment of the contract and its benefits from Afrikon to Jilk Construction was contrary to Clause 3.1. of the contract which outlaws subcontracting of more than 25% of the total contract works.
 - iv. There was a dispute between Afrikon, Woosun Jung, Sammy Kamau and Jilk Construction in respect to the contract between Afrikon and the National Irrigation Authority which came courtesy of the tender NIB/DRP/023/2018- 2019 awarded to Afrikon.
 - v. Sammy Kamau was raising payment certificates through Jilk Construction in place of Afrikon.
24. The petitioner also exhibited copies of change of officials' receipt dated 10th March 2021, stamp duty payment dated 10th March 2021, Transfer of Shares agreement dated 8th March 2021, CR-6 notice of appointment directors and their particulars, CR-29 Interim Annual Return and BOF1 for Beneficial Ownership showing that the respondent's ownership had significantly changed with the Sammy Maina Kamau accruing 75% of the respondent's shareholding while Woosun Jung retained 25%.
25. A letter dated 29th June 2022 from the Public Procurement and Regulatory Authority confirming that:
- i. Afrikon was awarded the tender and signed the contract referenced as NIB/DRP/023/2018-2019 with the National Irrigation Authority.
 - ii. The contract was assigned under Clause 3.1 of the contract to Jilk Construction Company Limited through an assignment of the contract dated 30th August 2021.
 - iii. Both Afrikon and Jilk construction had received various payments, the latest known being a payment made on 22nd April 2022 to Jilk Construction for Kshs. 143, 811,170.27.
26. From the above, the petitioner demonstrated prima facie that there was possible fraudulent conduct by the directors in the conversion of the respondent's assets to evade payment of debts to its Creditors which ought to be investigated.
27. Section 434 of the [Insolvency Act](#) provides that:-
- “(l) On the making of a liquidation order, the Official Receiver shall conduct an investigation-
 - (a) if the company has failed-to discover why the company failed; and
 - (b) generally, to investigate the promotion, formation, business, dealings and affairs of the company, and to make such report (if any) to the Court as the Official Receiver considers appropriate



- (2) In any legal proceedings, the Official Receiver's report is evidence of the matters stated in it until the contrary is proved.
28. The court may order examination into the conduct of a company's directors under Section 680 of the *Insolvency Act*.
29. The scope of the power of inquiry and examination of conduct of prescribed persons is wide and include; a) any officer of the company-past or present;(b) any person who is known or suspected to have control over any property of the company or believed to be indebted to the company; or(c)any person whom the Court believes capable of giving information concerning the promotion, formation, affairs or property of the company.
30. Assignments of company tender during liquidation has been alleged. Similarly, change of shareholding of the company during liquidation has also been alleged. And, failure or refusal to cooperate by the directors and former directors of the company is also a major complaint herein.
31. On the basis of the evidence presented, the court is satisfied that the conduct of the directors in question in dealing with the property, identity and shares of the company warrants an order for the examination into their conduct, particularly, James Githenji Maina, Mike Jung Woonsun and Sammy Maina Kamau.
32. At the moment, the court cannot determine the other prayers in the application as those will be determined after the examination and filing of a report by the official receiver.

Final disposal

33. In conclusion, I make the following orders: -
1. The present and former directors of the respondent, namely James Githenji Maina, Mike Jung Woonsun and Sammy Maina Kamau do furnish to the official receiver, the respondent company's statement of affairs and an inventory of its fixed and moveable assets within two (2) years preceding the date of filing the liquidation petition, within 14 days from the date of this ruling.
 2. If the directors do not comply with (1) above, the court may issue warrants of arrest against them or such other order as may be lawful and appropriate against them.
 3. The Official Receiver is hereby directed to carry out an investigation into the affairs of the respondent and into the conduct of the directors named above and issue a report within 90 days from the date of this ruling.
 4. The other orders sought will be considered after the examination or upon default by the directors on these orders.

DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 20TH DAY OF MARCH, 2025.

F. Gikonyo M

Judge

In the presence of: -

Ms. Muthoni for Petitioner



Ondieki for Apex

Mutugi for Eco Bank

Ms. Wamuyu for Regal Equipment

Kangethe for Kangethe Adv

Otieno for 10th Creditor

CA - Kinyua

