



**Imbuki v Crown Health Care Limited; Planlink Limited  
(Supporting Creditor) (Insolvency Petition E012 of 2021)  
[2025] KEHC 3283 (KLR) (Commercial and Tax) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3283 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E012 OF 2021**

**F GIKONYO, J  
MARCH 13, 2025**

**BETWEEN**

**DR EVANS AKETCHI IMBUKI ..... PETITIONER**

**AND**

**CROWN HEALTH CARE LIMITED ..... RESPONDENT**

**AND**

**PLANLINK LIMITED ..... SUPPORTING CREDITOR**

**JUDGMENT**

1. The petitioner, Dr. Evans Aketchi Imbuki, is a director of Wellcrest Hospital Limited. He filed the insolvency petition dated 24<sup>th</sup> March 2021, seeking the following orders: -
  1. Wellcrest Hospital Limited be liquidated by the Court under the provisions of the *Insolvency Act* No. 18 of 2015;
  2. The court appoints an authorized Insolvency practitioner as the Liquidator of the Company to collect and liquidate the remaining assets of the Company.
  3. The cost of this Petition be paid out of the assets of the Company.
2. The petition is supported by a verifying affidavit sworn by the petitioner on 24<sup>th</sup> March 2021, a statement of facts dated 24<sup>th</sup> March 2021 and written submissions dated 16<sup>th</sup> May 2024.
3. The petitioner's case is that Wellcrest Hospital Limited (the company/ debtor) is a private limited liability company incorporated in Kenya on 21<sup>st</sup> February, 2019 under the *Companies Act*, 2015 as a



- hospital to offer health care services. Its registered office is at Spur Mall, 1<sup>st</sup> Floor, along Thika Super Highway, Nairobi and its postal address is P. O. Box 21162 - 00100, Nairobi, Kenya.
4. The company's nominal capital is Twenty Million Shillings (Ksh. 20,000,000/-) divided into 400 Ordinary Shares of Fifty Thousand Shillings (Ksh. 50,000/-) each. The company has 18 shareholders and 11 directors. The amount of the capital paid up or credited as paid up is Kenya Shillings Nine Million Forty Nine Thousand Six Hundred and Fifty Three and Ninety Eight Cents (Ksh. 9,049,653.98/-) comprised of 181 shares.
  5. The petitioner averred that the company has huge debts in the sum of Kshs. 6,696,975.31/- as at 28<sup>th</sup> February, 2021. That the Company has not been able to pay rent from July, 2019 to February, 2021. In total there is an accumulated rent arrears for Kshs. 5,498,305/- as of December, 2020 from a monthly rent obligation of Ksh. 320,000/- (Kenya Shillings Three Hundred and Twenty Thousand).
  6. The company ordered equipment for Ksh. 3,574,213/- from Crown Equipment Ltd out of which equipment worth Ksh. 1,527,490.31 were supplied. The company has so far paid only Ksh. 805,220.00 and there is a balance of Ksh. 722,270.31 which remains unpaid.
  7. Other outstanding bills and liabilities of the Company include the following:
    1. Unpaid branding costs: Ksh. 90,000/=
    2. Networking cost: Ksh. 60,000/=
    3. Unpaid Legal fees to lawyer Kimiti: Ksh. 50,000/=
    4. Unpaid Salaries: Ksh. 138,200/= as follows:
      - i. Paul Mwangi: Ksh. 55,200/=
      - ii. Lab Tech: Ksh. 30,500/=
      - iii. Receptionist: Ksh. 28,500/=
      - iv. Housekeeper: Ksh. 24,000/=
  8. The petitioner also averred that since its incorporation and inception, the company was in operation from February, 2019 to December, 2019 only. The company was not making profits even when it closed its business. Over time, it has kept on accumulating debts and unpaid liabilities. The money used to settle part of the debt from Crown Health Care Ltd and payment of the rent for the first five months it was in operation since incorporation came from the paid-up shares by the shareholders. The company has been served with several demand letters by the Crown Health Care Ltd and the landlord to pay. The company's offices remain locked by the landlord due to huge rent arrears, while Crown Health Care Ltd has already threatened to sue the company for recovery of its money.
  9. The petitioner further averred that the company is not in a position to carry out any business presently and there are no prospects of it carrying on business in the future due to huge operational costs that it can't meet. That the Company is now insolvent and not able to pay its debts.
  10. The petitioner submitted that the company's debts and other unpaid liabilities are within the prescribed insolvency level under the *Insolvency Act*, 2015 and the provisions under Section 423 of the *Insolvency Act* 2015, which states that a company may be liquidated due to its inability to pay its debts.
  11. Relying on Section 423 and 435 of the *Insolvency Act*, the petitioner asserted that it has met the conditions for liquidation of the debtor. This is because he has shown that the debtor is unable to pay its debts according to Section 384(1) and (2) of the *Insolvency Act*. Secondly, the debtor has passed



the Special Resolution of 18<sup>th</sup> March 2021 resolving that the company be liquidated by the court. It further relied on the High Court decision in *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd (Insolvency Cause E006 of 2021)* [2022] KEHC 12 (KLR) (Commercial and Tax) (28 January 2022) (Judgment).

## Response

12. The opposing creditor, Crown Health Care Limited, filed an affidavit sworn by its Head of Legal and Compliance, Brian Sitima, on 27<sup>th</sup> September 2021 and written submissions dated 4<sup>th</sup> October 2024. The main contention is that the debtor has not given a statement of financial position and has not demonstrated inability to pay the sums owed to it.
13. Its case is that it entered into a contract with the debtor to supply hospital equipment for Kshs. 2,082,056. It was agreed that the debtor would pay Kshs. 800,000 and that the balance of Kshs. 1,282,056 was to be paid in six equal installments of Kshs. 213,676. It was also agreed that the creditor would retain ownership of the hospital equipment until full payment.
14. The creditor asserted that despite supplying the hospital equipment as agreed, the debtor failed to pay and still owes Kshs. 1,142,138. It also asserted that despite demand for payment, the debtor has failed to pay and has not even offered a repayment plan.
15. The creditor submitted that the petition does not meet the threshold for grant of a liquidation order because it is not accompanied with a statement of financial position in the manner and form prescribed in Form 32 set out in the first schedule of the Regulations. Relying on Regulation 77B (2) of the Insolvency Regulations, the creditor submitted that it is a strict procedural requirement that a petition for liquidation shall be accompanied by a statutory demand if the reason is indebtedness and a statement of financial position. The creditor also cited the High Court decision in *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd* [supra].
16. The creditor contended that the bank statement attached to demonstrate indebtedness does not list the assets owned by the debtor vis a vis its pending liabilities. It thus contended that there is nothing to show that the debtor's liabilities far exceed its assets and that the debtor is not commercially viable.
17. The creditor relied on Section 427 (1) of the *Insolvency Act* to argue that the court may dismiss a liquidation petition that does not meet the statutory threshold.
18. The creditor asserted that the petitioner has come to court with unclean hands since the debtor is still indebted to it and is still in possession of the medical equipment and consumables supplied. It therefore urged the court to direct the debtor to return them.

## Highlighting

19. During highlighting of submissions on 10<sup>th</sup> February 2025, Mr. Kioko appeared for the creditor while Ms. Ochieng and Ms. Cheruiyot appeared for the opposing and supporting creditors respectively.
20. Ms. Cheruiyot indicated that the supporting creditor did not file written submissions and would abide by the court's decision.
21. Ms. Ochieng reiterated that since the petitioner did not file the debtor's statement of financial position, the petition ought to be dismissed.
22. On the other hand, Mr. Kioko was firm that they did file a bank statement. He contended that the Insolvency Regulations do not require the filing of a statement in a particular format. He indicated



that the only known asset is the share capital. He further intimated that the equipment formed part of the assets of the debtor which will be sold and distributed to creditors.

23. Mr. Kioko mentioned that there was an arrangement to settle the debt but the debtor could not honour as they were not financially stable. However, he indicated that he was not aware of any arrangement to return the equipment should it not pay.
24. Mr. Kioko concluded by submitting that the *Insolvency Act* was enacted to prevent harassment by creditors such as the conduct by the opposing creditor.

### **Analysis and Determination**

25. The threshold for grant of liquidation order is in issue here. Has the petitioner proved grounds for a liquidation order?
26. In *Kenya Artisans Limited v Chemical & Allied Workers Union* [2021] eKLR the Court observed that: -

“32. The test for placing a company in liquidation, in short, is that it cannot pay its debts as they fall due. A company may be liquidated either voluntarily, by means of the board of directors passing a resolution to that effect, or an application can be made to court either by the company itself (a shareholders’ resolution is required) or by a creditor or shareholder of the company.

33. The court must decide whether all of the requirements in terms of the Act for the granting of a liquidation order have been met. It is for courts to exercise their discretion once all of the requirements have been established on a prima facie basis. In the absence of special or unusual circumstances which the respondent must establish, the court should ordinarily grant a liquidation order once the requirements are met.”

27. This is a liquidation petition by a director for the reason that the company has by special resolution resolved that the company be liquidated by the court for inability to pay its debts under section 425(1) (a) of the *Insolvency Act*.
28. Section 424 of the *Insolvency Act* sets out the circumstances in which a company may be liquidated by the Court. Of specific relevance to this petition: -
  - a) The company has by special resolution resolved that the company be liquidated by the court;
  - b) The company is unable to pay its debts; or
  - c) The court is of the opinion that it is just and equitable that the company should be liquidated.
29. Under Section 384 of the *Insolvency Act*: -

“(1) For 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 a 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).”

- 30. Whether a company is unable to pay its debts is a matter of evidence. *Chic Tava Limited v Kenchic Limited & 6 others (Insolvency Petition 10 of 2016) [2024] KEHC 5353 (KLR) (Commercial and Tax) (17 May 2024) (Judgment)*
- 31. The petitioner produced; the company's special resolution dated 18<sup>th</sup> March 2021 to the effect that the company be liquidated by the court; demand letters and invoices from the supporting and opposing creditors; an order from the Business Premises Rent Tribunal restraining the supporting creditor from levying distress against the debtor.
- 32. The petitioner also produced its Cooperative Bank account statement dated 26<sup>th</sup> March 2021 which merely shows its recent transactions and cash balance of Kshs. 12,505.
- 33. The opposing creditor opposed the petition because the debtor has not given a statement of financial position in the manner and form prescribed in Form 32 set out in the first schedule as per Regulation 77B (2) of the Insolvency Regulations. It also contended that the petitioner has not demonstrated inability to pay the sums owed to it. It further contended that under the terms of the contract, it retained ownership of the equipment supplied to the debtor until payment in full. It therefore faulted the debtor for holding on to the equipment and at the same time failing to pay for them.
- 34. The petitioner countered that the Insolvency Regulations do not require the filing of a statement in a particular format.
- 35. Regulation 77 B of the Insolvency Regulations provides that: -

“Liquidation by court

- (1) For the purposes of section 425 of the Act an application for liquidation shall be—
  - (a) by way of a petition in Form 32C as set out in the First Schedule; and
  - (b) accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.
- (2) The petition for liquidation shall be accompanied by the following documents —
  - (a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and



(b) a statement of financial position in Form 32 as set out in the First Schedule where necessary.”

36. From the above, the statement of financial position in Form 32 as set out in the first Schedule shall accompany a liquidation petition under section 425 of the *Insolvency Act* “where necessary”
37. Put differently, a statement of financial position in Form 32 may not be required to accompany all liquidation petitions. The requirement is dependent on the circumstances of the case.
38. In this case, the opposing creditor argued that by failing to present a statement in Form 32, the petitioner has not demonstrated inability to pay the sums owed to it. It contended that the bank statement attached to demonstrate indebtedness does not list the assets owned by the debtor vis a vis its pending liabilities. It thus contended that there is nothing to show that the debtor’s liabilities far exceed its assets and that the debtor is not commercially viable.
39. The bank statement produced by the petitioner is not in Form 32 and does not show the company’s assets, liabilities and overall financial health.
40. The statement in Form 32 factors the assets subject to fixed charge and unchanged assets with their book value and estimated realisable value, estimated total assets available for preferential, company creditors, summary of liabilities and company shareholders. This enables the court to ascertain the company’s financial standing. *East Africa Cables Limited v SMB Bank (K) Limited* [2020] KEHC 9359 (KLR)
41. However, the petition, verifying affidavit sworn by the petitioner on 24<sup>th</sup> March 2021, the statement of facts dated 24<sup>th</sup> March 2021 and submissions by the parties reveal several matters. The company is not operational and the premises where it operates are closed due to non-payment of rent. Demands in writing to pay debts in issue had been given but the company has not paid the debt. The only asset of the company is the share capital and interest in the medical equipment herein to the extent of the part payment made under the agreement. According to the agreement, the opposing creditor retains ownership of the said medical equipment.
42. Whereas it is necessary to file statutory forms, in the circumstances of this case, the statement in Form 32 is not necessary.
43. Even if the statement was necessary, the omission is curable defect that causes not dismissal of petition. *Noble Resources International PTE Limited v Kitmin Holdings Limited; Shamit Varma & another (Interested Parties)* [2020] KEHC 3538 (KLR); *Leo Investments Ltd v Trident Insurance Company Ltd* HC Comm No. 893 of 2010 [2014] eKLR.
44. Analysis thereof, the court is satisfied that the company is unable to pay its debts.

#### **Return of equipment to the opposing creditor**

45. Ownership of the medical equipment and how it will be dealt with is of particular importance in these proceedings.
46. It is not disputed that the opposing creditor supplied the debtor with equipment. The opposing creditor’s position is that it supplied equipment worth Kshs. 2,082,056 but the debtor still owes Kshs. 1,142,138.
47. On the other hand, the petitioner’s position is that the debtor ordered equipment worth Ksh. 3,574,213/-; that the creditor supplied the debtor with equipment worth Kshs. 1,527,490.31 out of



which a sum of Ksh. 805,220.00 was paid and leaving a balance of Ksh. 722,270.31 which is owing to date.

48. The opposing creditor urged the court to direct the debtor to return the equipment to it because it was agreed that it would retain ownership of the hospital equipment until full payment.

49. It produced a copy of the sale agreement dated 8<sup>th</sup> April 2019, containing a retention of title clause in the following terms: -

“Ownership of the Equipment

The equipment to be supplied shall remain the property of Crown Healthcare until Wellcrest Hospital Limited pays all the monies as per the terms of this sale agreement...”

50. I do note that the petitioner’s counsel asserted that the only known asset is the share capital. However, he also indicated that the equipment that was supplied formed part of the assets of the debtor which will be sold and distributed to creditors.

51. The agreement herein contains retention of title clause. Under Section 2 of the *Insolvency Act* a credit purchase agreement to include a retention of title agreement.

52. According to section 2 of the *Insolvency Act*: -

“retention of title agreement” means an agreement for the sale of goods to a company, being an agreement that does not constitute a charge on the goods; but under which, if the seller is not paid and the company is wound up, the seller will have priority over all other creditors of the company with respect to the goods or any property representing the goods as long as it has satisfied the applicable requirements for third-party effectiveness under the *Movable Property Security Rights Act* (Cap. 499A);

53. A ‘retention of title agreements’ does not create a charge on the goods, but in liquidation, the seller will have priority over all other creditors of the company with respect to the goods or any property subject of a ‘retention of title agreement’.

54. Therefore, the fact that the seller retains the title of the goods does not ipso fact remove the asset from the purview of liquidation, except, that, in liquidation, the seller will have priority over all other creditors of the company with respect to the goods or any property subject of a ‘retention of title agreement’.

55. See also *Midland Energy Limited v George Muiruri t/a Leakeys Auctioneers & another* [2019] eKLR, that: -

“21. Sections 560 and 561 of the Act are explicit that the moratorium bars the repossession of goods in a Company’s possession over a Credit purchase transaction and/or hire purchase agreement. Under section 2 of the Act a Credit Purchase Transaction means a hire-purchase agreement, a conditional sale agreement, a chattel leasing agreement or a retention of title agreement. Synergy being the owner under the Hire Purchase Agreement did not have any special privilege over the other Creditors of the Company.”

56. The *Insolvency Act* is silent on the return of goods supplied under a retention of title agreement. The court must therefore have regard to the objectives of the Act, which is to protect financially strained companies from adverse dealings by its creditors without the court’s supervision or approval. The court



ought to balance the interests of the company, the interests of the opposing creditor and the interests of the other creditors.

57. From the pleadings and evidence, the worth of the equipment supplied and the debt owing to the opposing creditor is contested. The opposing creditor has produced an agreement showing that it was agreed that it would retain the title to the equipment supplied until full payment. Even though the sum owing is disputed, there is no dispute regarding the retention of title; the creditor retains ownership of the equipment and has priority over all other creditors in respect of the equipment. It cannot, therefore, form part of the debtor's assets.
58. However, Section 589 of the *Insolvency Act* provides that the Court may make an order authorising the administrator of a company to dispose of goods that are in the possession of the company under a credit purchase transaction as if all the rights of the owner under the agreement were vested in the company. This is only if the Court believes that disposal of the goods would be likely to promote the purpose of administration of the company.
59. The debtor has partly paid for the equipment. It would be entitled to claim for the sums paid if the equipment was returned. It bears repeating that, the law is silent on return of such property under 'retention of title agreement' during liquidation. However, balancing the interests of all parties, the equipment should be dealt with within the liquidation, but of course, strictly in accordance with the law to avoid prejudice to the debtor or the seller (opposing creditor).
60. It is also important to note that, the fact that the opposing creditor retains the title of the medical equipment is not ipso facto a bar to an order of liquidation. Retention of title agreement does not create a charge on the goods, but in liquidation, the seller will have priority over all other creditors of the company with respect to the goods or any property subject of a 'retention of title agreement'. See section 2 of the *Insolvency Act* on 'retention of title agreement'.
61. The liquidator will deal with the equipment in the manner prescribed in law. Except, the opposing creditor will make a refund of such proportion of the deposit paid as shall be evaluated to be represented in the equipment after considering the depreciation as well as use of the equipment by the debtor. The liquidator to so deal.

### Conclusions and order

62. Section 427 of the *Insolvency Act* provides that: -

“ 427.

- (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:
  - (a) an order dismissing the application;
  - (b) an order adjourning the hearing, conditionally or unconditionally;
  - (c) an interim liquidation order; or
  - (d) any other order that, in its opinion, the circumstances of the case require.
- (2) However, the Court may not refuse to make a liquidation order on the ground only that the company's assets have been



mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.

- (3) If the application is made by members of the company as contributories on the ground that it is just and equitable that the company should be liquidated, the Court shall make a liquidation order, but only if of the opinion that-
- (a) that the applicants are entitled to relief either by liquidating the company or by some other means;
- And
- (b) that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated,
- (4) Subsection (3) does not apply if the Court is also of the opinion that-
- (a) some other remedy is available to the applicants;
- and
- (b) they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy."

63. The statement of accounts may not be necessary as it appears that the only assets of the company is the share capital and interest in the medical equipment to the extent of the part payment under the purchase agreement. The company as well as the creditors have shown that the company has not paid the debt owed to them despite demand notices delivered to the company.

64. The company is unable to pay its debts. The company is not operational and there are no prospects of revival or sustenance as a going concern. There is not any other feasible or available remedy. And, there is nothing to suggest that the directors are acting unreasonably in seeking to have the company liquidated. Accordingly, liquidation is the most appropriate undertaking in the interest of the parties concerned.

65. In the upshot, a liquidation order is hereby issued. The official receiver is appointed the liquidator.

66. In accordance with section 432 of the *Insolvency Act*:

‘Within seven days after a liquidation order is made in respect of a company, the company shall lodge a copy of the order with the Registrar for registration and also lodge a copy of it with the Official Receiver’

67. The company to so comply.

68. The liquidator to accordingly undertake the liquidation of the company as per the law, and deal with the medical equipment as directed by the court.

69. Orders accordingly.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**



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**F. GIKONYO M**

**JUDGE**

In the presence of: -

Makori for Ms. Ochieng for Opposing Creditor

Ms Njai for Ms. Cheruiyot for Supporting Creditor

Kioko for Petitioner

CA - Kinyua

