



REPUBLIC OF KENYA



KENYA LAW

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In Re Winding Up Sunus (Baby & Children Wear) Limited (Insolvency Petition E056 of 2022) [2024] KEHC 2279 (KLR) (Commercial and Tax) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2279 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E056 OF 2022
JWW MONG'ARE, J
MARCH 5, 2024
IN THE MATTER OF THE COMPANIES ACT NO.17 OF 2015
AND
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
AND
IN THE MATTER OF WINDING UP SUNUS (BABY & CHILDREN WEAR) LIMITED

BETWEEN
SUNUS (BABY & CHILDREN WEAR) LIMITED PETITIONER

AND
RIVERLAND LIMITED 1ST CREDITOR
FINE KNIT (KENYA) LIMITED 2ND CREDITOR
JACKSON KISALU 3RD CREDITOR

JUDGMENT

1. Before this Honourable court is a petition filed on 21st December 2022 brought under the provisions of Sections 424 (1) (e) and 425 of the *Insolvency Act* filed by Kamlesh Shantilal Dhanani as a director of the Company being the Petitioner herein. The Petitioner humbly prays: -
 - i. For a declaration that the Company is unable to pay its debts;
 - ii. That Sunus (Baby & Children Wear) Limited be liquidated by the Court under the provisions of the *Insolvency Act*, 2015;



- iii. That the Court appoints an authorized Insolvency Practitioner to act as the Interim Liquidator of the Company with powers to collect, preserve and sell the Company's assets;
 - iv. That the cost of this Petition be provided for; and
 - v. Such orders as may be necessary and just in the circumstances.
2. The petition is premised on the grounds set on body of the petition and is supported by a certificate of compliance dated 21st December 2022, a replying affidavit and further affidavit both sworn on 6th April 2023, by Kamlesh Shantilal Dhanani, the Petitioner's Director and shareholder. In opposition to the petition, the 1st & 2nd Creditors filed a replying affidavit sworn on 22nd March 2023 by Samir Shah, a director of the 1st & 2nd Creditors Companies and a Notice to produce dated 22nd March 2023. The 3rd Creditor filed a replying affidavit sworn by Jackson Kisalu, the 3rd Creditor herein on 7th July 2023.
 3. The Petitioner's case is that it scaled down its operations in March 2020 due to the Covid-19 pandemic since its clients had ceased operations and there was a cessation of movement in the country. Consequently, it was not able to meet its obligations as and when they fell due since it was not generating any income. The Petitioner relied to its last statement of account dated 31st March, 2022 which shows that it suffered a loss of Kshs.464,388/=. It stated that as at the date of the statement, its book value was Kshs. 2,587,273/=:, whereas its total value of liabilities was Kshs.12,097,576/=. It further stated that it has explored all options available to it including seeking financing and injecting more capital, to no avail.
 4. The Petitioner averred that it was served with a decree dated 22nd September 2022 issued in MCCOMMSU No. E044 of 2021 for the payment of Kshs.2,544,225.67, and a demand letter dated 23rd November 2022 for payment of the decretal sum in MCCOMMSU No. E042 of 2021, but it has failed to pay the aforesaid sums which means execution is imminent. It further averred that owing to its insolvency, it is unable to pay its debts as can be seen from its statement of financial position.
 5. It contended that it only continued to run its business despite incurring initial losses in the hopes that it would regain its footing and remain afloat, but the Covid-19 crisis forced it to completely scale down its operations in the year, 2020, thus necessitating the proceedings herein. The Petitioner asserted that this petition was advertised in the Standard Newspaper on the 14th January, 2023 thus it is not defective for want of publication.
 6. In response thereto, the 1st & 2nd Creditors in opposition thereto averred that this petition was an attempt by the Petitioner to avoid the Creditors' decrees obtained in MCCOMMSU No. E042 of 2021 and MCCOMMSU No. E044 of 2021. They argued that this was because, the Petitioner had not produced any proof of the alleged debts owed to the other Creditors other than the 1st & 2nd Creditors herein, whose rights were likely to be defeated in the event this petition is allowed. In addition, they argued that the Petitioner had defended the aforementioned suits and offered payment plans to the 1st & 2nd Creditors as late as the year 2021, a clear indication that it was not only a going concern but was also willing and able to settle the debts owed to the said Creditors. For this reason, the Creditors maintain that the claim of losses from the year 2018 were doubtful thus making the financial statements produced by the Petitioner questionable.
 7. The Creditors further contended that in as much as the Petitioner alleged that it started incurring losses in the year 2018, it continued to trade and incur debt despite being unable to pay them, and only filed the petition herein once it was served with a demand for payment of the decretal sums in MCCOMMSU No. E042 of 2021 and MCCOMMSU No. E044 of 2021. The 1st & 2nd Creditors asserted that the Petitioner's financial statements were unsupported by its bank account statements



and the same needed to be verified their correctness hence they could not be relied on solely as proof of financial stress of the Petitioner. The above notwithstanding, they averred that this petition was defective for want of advertisement in light of the Court's directions issued on 28th December 2022.

8. The 3rd Creditor on the other hand averred that it had a judgment against the Petitioner for Kshs.122,129/= and costs issued by the Employment and Labour Relations Court in ELRC No. 1891 of 2017, However, the aforementioned costs were yet to be taxed. It further averred that the said judgment was not subject of an appeal or an application for review, and the Petitioner was yet to pay him the said decretal sum emanating therefrom.
9. Directions were issued by the Court following the Creditors Notice to produce documents related to the Company and on 1/11/2023 the Director Mr. Kamlesh Shantilal Dhamani produced the same in court and was cross examined by the creditors on the same.
10. Subsequently, parties herein were directed to file written submissions which they did. I shall not regurgitate the contents of the said submissions but I have considered them and will refer to them in my determination.

Analysis and Determination

11. I have carefully considered and analyzed the pleadings filed by the parties herein in support and in opposition to the instant application together with the written submissions by Counsel for parties, and I am of the considered view that the issue that arises for determination is “whether this Court should issue an order liquidating the Petitioner on grounds that it is no longer able to pay its debts.”
12. This petition is heavily grounded on the fact that the Petitioner is unable to pay its debts thus it should be liquidated by an order of this Court. The Petitioner relies on the provisions of Section 424 (1) (a) & (e) of the *Insolvency Act* 2015 in support of this petition. It states that:-
A Company may be liquidated by the Court if-
 - a. the Company has by special resolution resolved that the Company be liquidated by the Court;
 - b.
 - c.
 - d.
 - e. the Company is unable to pay its debts;
13. Section 384 of the *Insolvency Act* 2015 provides for the circumstances in which a Company may be deemed unable to pay its debts as follows:-
 1. For purposes of this Part, a Company is unable to pay its debts-
 - a. if a Creditor (by assignment of 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 judgments, 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).
3. The insolvency regulations may increase or reduce the amount specified in subsection (1) (a).
14. The Petitioner submitted that this petition has met the criteria laid out under Section 384 & 424 of the Insolvency Act in view of the fact that before this petition was filed, the Petitioner passed a special resolution on 20th November 2022 resolving that it be liquidated by the court since it was unable to pay its debts.
15. It is evident from the record that the 1st & 2nd Creditors served the Petitioner with a decree issued in MCCOMMSU No. E044 of 2021 for the payment of Kshs.2,544,225.67/=, and a demand letter for payment of the decretal sum in MCCOMMSU No. E042 of 2021, but the Petitioner has failed to pay the aforesaid sums. The Petitioner contended that as of 31st March 2022 its book value was Kshs.2,587,273/=, whereas its total value of liabilities was Kshs.12,097,576/=. Thus, it has no reasonable prospects to pay the debts owed to its Creditors. The Petitioner relied on the cases of re Iflix (Kenya) Limited [2020] eKLR and re Ukwala Supermarket (Eldoret) Limited [2020] eKLR and argued that its evidence of indebtedness is unchallenged hence it has established grounds for its liquidation. The 1st & 2nd Creditors on the other hand contended that the Petitioner's indebtedness to other Creditors has not been proven.
16. Notably, annexed to the Petitioner's further affidavit, are copies of statements of accounts which the Petitioner claim they belong to its Creditors, detailing the debts owed to them by the Petitioner. However, looking at the said statements, it is impossible to authenticate them and/or verify that they reflect the true position of the Petitioner's indebtedness. This is because, the said statements do not bear a stamp of the respective companies which the Petitioner is allegedly indebted to, they have not been produced by a representative of the said companies, and even after this petition was advertised by the Petitioner in the standard newspaper on 14th January, 2023, the said Creditors did not come forth and present their claims/demands as against the Petitioner.
17. It is trite that he who alleges must prove, this maxim is founded on the provisions of Section 107, 108, & 109 of the Evidence Act Cap 80 of the Laws of Kenya. Accordingly, the Petitioner bears the duty of proving and/or demonstrating the allegation that its liabilities outweigh its book value. By the time this Court was retiring to write this judgment, the only confirmed debts that are due and owing from the Petitioner to its Creditors are as can be seen from the decree dated 22nd September 2022 issued in MCCOMMSU No. E044 of 2021, demand letter dated 23rd November 2022 and judgment in ELRC No. 1891 of 2017.
18. In view of the foregoing, it can easily be concluded that this petition is in compliance with the provisions of Section 384(1) (b) of the Insolvency Act 2015. Accordingly, the Court now has to determine whether the petition has been filed in good faith. In re James Maina Kabatha (Debtor/Applicant) [2020] eKLR the Court referred to the case of Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) where the US Supreme Court explained the fundamental goal of bankruptcy law and held that:-

“The twin goals of consumer or individual bankruptcy law are to protect Creditors and ensure optimal payment to them where possible; and the provision of shelter and a "fresh



start" to individual debtors overburdened by debt. There is no doubt that these twin goals run through the *Insolvency Act*, 2015 and the Insolvency Regulations, 2016.

...

The "fresh start" goal is accomplished through the bankruptcy discharge, which usually releases the debtor from personal liability from certain debts and prevents Creditors from taking any action against the debtor to collect those debts.

Consequently, bankruptcy protection being an extraordinary relief, one of the corollaries to the these seemingly conflictual twin goals of bankruptcy law – the protection of Creditors and the provision of fresh start for the honest but unfortunate debtor -- is that an individual seeking bankruptcy protection is required to scrupulously demonstrate that he is acting in good faith and disclose all his financial information.

It is only upon meeting this double threshold – demonstration of good faith and full disclosure of all financial information – that a Petitioner can become entitled to a bankruptcy order.

19. The Respondent in its submissions argued that the Petitioner's financial statements reveal that as of the year 2020, the Petitioner had stocks worth Kshs.28,590,200/= which would be sufficient to offset its debts. They submitted that the Petitioner's Director admitted to the contradictions and inconsistencies in the Petitioner's financial statements during his cross-examination. For instance, the annual report for the year ending 31st March 2020 found at page 46 of the Petitioner's pleadings indicate inventories as Nil. whereas the annual reports for the year ending 31st March 2021 & 31st March 2022 found at page 35 & 15 of the Petitioner's pleadings respectively, indicates that stock in trade under inventories for the year 2020 as Kshs. 28,590,200/=. In view of the above, the 1st and 2nd Creditors submitted that the Petitioner filed this petition in bad faith and with intent to avoid the Creditors lawful claims. The Petitioner on the other hand cited the case of *Kenya Artisans Limited v Chemical & Allied Workers Union* [2021] eKLR and contended that the petition herein has been filed in good faith
20. This Court has had an opportunity to peruse the Petitioner's financial statements annexed to this petition and confirmed the aforementioned inconsistencies pointed out by the 1st & 2nd Creditors indeed exist. For this reason, I find that the Petitioner ought to at the very least offer an explanation for the said glaring inconsistencies in its financial statements for the years 2020, 2021, & 2022, but it did not. The financial statements attached to this petition by the Petitioner are supposed to be corroborated by the Petitioner's bank statements, and assist this Court to understand the Petitioner's true financial position.
21. Upon perusal of the Petitioner's bank statements annexed to its replying affidavit, I agree with the 1st and 2nd Creditors that they do not show how the said Kshs.28,590,200/= was applied. This leaves this Court with more questions than answers. It is further unclear whether the Petitioner's financial statements are inaccurate or whether they were altered/doctored in order to support this petition.
22. In light of the foregoing, this Court finds that there is lack of full disclosure of the Petitioner's financial position. In addition, failure to offer an explanation as to how the stock of Kshs.28,590,200/= for the year 2020 as can be seen in its financial statements for the years ending 31st March 2021 and 31st March 2022 were applied leads to this Court concluding that the instant application has been filed in bad faith.
23. The Petitioner's financial statements and its bank account statements in my view do not demonstrate inability to pay its debts instead, it demonstrates that the Petitioner is trying to avoid satisfying the Creditors lawful claims by filing this petition.



24. In the end, this Court finds that the instant petition is not merited. As a result, it is hereby dismissed with costs to the Creditors.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MARCH, 2024.

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J. W. W. MONG'ARE

JUDGE

In the presence of:-

Mr. Njagi holding brief for Mr. Maranga Nyangute for the Petitioner.

Ms. Kendi for 2 Creditors – Riverland and Fine Knit.

Ms. Kauma holding brief for Ms. Mumo for the Official Receiver.

Amos - Court Assistant

