



REPUBLIC OF KENYA



**Kiarie v Gifted Hands School Limited (Insolvency Petition E169 of 2019)
[2024] KEHC 2268 (KLR) (Commercial and Tax) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2268 (KLR)

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

INSOLVENCY PETITION E169 OF 2019

PM MULWA, J

MARCH 7, 2024

IN THE MATTER OF GIFTED HANDS SCHOOLS LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

AND

IN THE MATTER OF THE COMAPNIES ACT (2015)

BETWEEN

JOHN MAINA KIARIE PETITIONER

AND

GIFTED HANDS SCHOOL LIMITED RESPONDENT

RULING

1. The petitioner filed a creditor's petition dated 3rd June 2019 seeking the following orders: -
 - a. The company be liquidated by the Court under the provisions of the *Insolvency Act* 2015;
 - b. The Court appoint the Official Receiver who is an authorized Insolvency Practitioner as the Provisional Liquidator; and
 - c. The costs of this Petition be granted to the Petitioner and be paid out of the Company's assets.
2. The petition proceeded with the petitioner testifying and closing his case on 28th February 2020. Thereafter, vide a motion dated 26th May 2022 the respondent successfully sought leave to file a response to the petition out of time. An answer to the petition dated 21st October 2022 was filed.



3. This ruling is in respect of the respondent's notice of preliminary objection dated 18th November 2022, wherein the respondent contends: -
 - (1) That the application (sic) is fatally defective and in any event null and void ab initio for being brought prematurely before the applicant had exhausted all the alternatives available in law on execution contrary to section 18 of 2015 of the *Insolvency Act*.
 - (2) That there is no prove that the respondent is unable to pay the debt as enshrined under Section 384bc of the *Insolvency Act*.
 - (3) That Section 384 [2] has not been properly illustrated by the applicant.
4. The PO was canvassed through written submissions. The petitioner and the respondent filed written submissions dated 11th May 2023 and 30th January 2023, respectively.

Analysis and Determination

5. I have considered the notice of preliminary objection and the parties' respective submissions. The issue for determination is whether the PO is merited.
6. It is now well-settled that a preliminary objection must be raised on a pure point of law and should not require the ascertainment of facts through evidence. This principle has been established in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Ltd.* [1969] EA 696, cited in the respondent's submissions, where Law, JA observed as follows:

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as preliminary objection may dispose of the suit.

In other words, for a preliminary objection to succeed, the facts pleaded by the other party are assumed to be correct, it must be a matter of law which is capable of disposing off the suit, it must not be blurred by factual details calling for evidence and it must not call upon the court to exercise discretion.”

7. According to the respondent the liquidation petition has been brought prematurely as the petitioner did not pursue other methods of execution. It relied on the case of *Re of Spencon Kenya Limited* [2016] eKLR for the proposition that liquidation petitions are only ideal where there is clear evidence that a company is unable to pay its debts. And further, the fact that a company owes another company or an individual money does not in itself lead to winding up proceedings (See *Re Bentley Travel Ltd NRB W-up No. 5 of 1999 (UR)*).
8. On the other hand, counsel for the petitioner submitted that there existed no provision in law requiring that a petitioner exhaust all alternative methods before filing an insolvency petition. He relied on the Court of Appeal decision in *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* (Civil Appeal No. 98 of 2017) [2018] eKLR, where it was held:

“There is no requirement under the *Insolvency Act* or the *Companies Act* which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence (emphasis mine).”



9. The above position was reiterated in the case of *Rufus Ragui & another v Vivo Energy Kenya Limited* [2020] eKLR, where the court added that Section 38 of the *Civil Procedure Act* clearly spelt out various modes of execution a court may grant upon application by the decree-holder.
10. For the above reason, I find that the commencement of the petition herein was not premature and the first ground of the PO must fail.
11. The second and third grounds are that there is no proof that the respondent is unable to pay the debt as enshrined under Section 384 (1) (b) and (c) of the *Insolvency Act* and that Section 384 (2) has not been properly illustrated by the petitioner. The respondent submitted that there is no evidence that it is unable to pay its debts to warrant the petitioner to pursue its liquidation.
12. It is my finding that grounds 2 and 3 as raised in the PO do not meet the criteria set out in the *Mukhisa Biscuit case* [supra] as they require the Court to delve into the facts or evidence. They are not pure points of law that warrant the dismissal of the petition at the preliminary stage. Rather, they are main issues warranting the hearing and determination of the petition.
13. The upshot is that the notice of preliminary objection dated 18th November 2022 is without merit and is dismissed with costs to the petitioner.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH 2024.

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MULWA

JUDGE

In the presence of:

Mr. Ntwiga hb for Mr. Muriungi for the Applicant

Ms. Obiria hb for Mr. Pala for the Respondent

Court Assistant: Carlos

