



**Matu v Microclinic Technologies Limited & another (Insolvency Cause E007 of 2021)  
[2024] KEHC 2280 (KLR) (Commercial and Tax) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2280 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E007 OF 2021  
JWW MONG'ARE, J  
MARCH 5, 2024  
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015  
IN THE MATTER OF WINDING UP OF THE MICROCLINIC TECHNOLOGIES LIMITED**

**BETWEEN**

**MARY WANJA MATU ..... PETITIONER**

**AND**

**MICROCLINIC TECHNOLOGIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**HOFFMAN MOKA LANTUM ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner filed the liquidation Petition dated 19<sup>th</sup> September 2020, seeking the following Orders: -
  - a. That the Company known as Microclinic Technologies Limited be wound up by the Court under the provisions of the *Insolvency Act* 2015.
  - b. That the Official Receiver be appointed to run the affairs of Microclinic Technologies Limited pending the winding up of the same.
  - c. That pending the determination of this Petition, an order be made to maintain the status quo of the company pending hearing and determination of the Petition.
  - d. That the assets of the Company be fully ascertained, accounted for and distributed proportionately between the shareholders as provided by law.
  - e. That the dealings of the company assets from the year 2012 to date, which is approximately 8 years, be investigated.



- f. That in the alternative, the Honourable Court grants such other alternative remedies as would be fair and just in all the circumstances of the case.
  - g. That this Honourable Court be pleased to make such further orders as may be deemed just and expedient.
  - h. That the costs of this Petition be provided for.
2. The Petitioner also filed a verifying affidavit sworn on the same date, a supplementary affidavit sworn on 13<sup>th</sup> February, 2023, pursuant to leave of Court and written submissions dated 14<sup>th</sup> February 2023. The Petitioner's case is that her and the 2<sup>nd</sup> Respondent have been having wrangles with respect to the management of 1<sup>st</sup> Respondent company (the company) from 2012 when the 2<sup>nd</sup> Respondent started running the company unilaterally; that in 2015, the 2<sup>nd</sup> Respondent negotiated and agreed to procure tablets on behalf of the company from Mustek East Africa Limited for Kshs 2,706,775.48/=; that the 2<sup>nd</sup> Respondent only informed her of the debt owed to Mustek two years later; that the 2<sup>nd</sup> Respondent has not accounted for the said laptops; that due to the differences, the company has failed to hold board meetings as required and the 2<sup>nd</sup> Respondent has failed to avail the company's financial statements and books of account.
  3. The Petitioner urged that she has made a case for liquidation of the company as it is unable to pay its debts. She relied on Section 425 of the *Insolvency Act* which allows or makes provision for the company or its directors as persons eligible to apply for liquidation and Section 424 (1) paragraphs (e) and (g) which provide that a company may be liquidated by the Court if the company is unable to pay its debts and where the Court is of the opinion that it is just and equitable that the company should be liquidated.
  4. The Petitioner further relied on Section 384 of the *Insolvency Act* which details the circumstances upon which a company may be deemed unable to pay its debts.
  5. The Petitioner asserted that she issued the requisite notices to the company's creditors. She also asserted that the 2<sup>nd</sup> Respondent has not put forth any evidence to show that the company's assets are more than its liabilities. For this assertion, she relied on the holding in the case of *Printwell Industries Limited v East African Educational Publishers and another* [2018] eKLR.
  6. The Petitioner highlighted that the company owes Mustek East Africa Limited (Mustek) a debt of Kshs 2,706,775.48/=, acknowledged by the 2<sup>nd</sup> Respondent; she further contended that the emails exhibited by the 2<sup>nd</sup> Respondent show that the 2<sup>nd</sup> Respondent acknowledged the tablets, the subject of the debt; that Mustek issued a demand for the debt through an email dated 18<sup>th</sup> August 2015; that on 28<sup>th</sup> September 2015, Mustek informed the 2<sup>nd</sup> Respondent that they have engaged external debt collector and that contrary to the Articles of Association, the 2<sup>nd</sup> Respondent, unilaterally instructed MMAN Advocates to deal with the demand letter.
  7. Relying on the holding of the court in the case of *Edwin Kipng'eno Rono v Leawin Limited & another* [2019] eKLR, the Petitioner asserted that considering the deadlock between the Petitioner and the 2<sup>nd</sup> Respondent, it is just and equitable that the company be liquidated. The Petitioner further urged the court to be guided by the decision in the case of *Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & Another* [2015] eKLR which decision reemphasized the principles the court ought to consider on the doctrine of separate legal personality which position was also the courts finding in the case of *Multichoice Kenya Ltd v Mainkam Ltd & Anor.* [2013] eKLR where it was argued that as a director / shareholder she is not personally liable to pay the company's debt as the company is a separate and independent legal entity, different from its directors and or shareholders.



## Response

8. In opposing the Petition, the 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 11<sup>th</sup> March 2022 and written submissions dated 15<sup>th</sup> June 2023. He denied the allegations of poor management and of making unilateral decisions. He asserted that the Petitioner has since incorporation been the custodian of the company's records, documents, transactions and statements of account as the Chair of the board of directors. He claimed that the Petitioner was the one who negotiated and entered the agreement with Mustek; that he was based in the United States of America at the time and cannot be expected to know the whereabouts of the products and equipment procured from Mustek; that his requests for the holding of board meetings to address the Company's outstanding debt to Mustek were not acceded to by the Petitioner; that at a meeting facilitated by their advocates, the Petitioner agreed to deposit half of the outstanding debt to Mustek with the advocates for their advocates for onward transmission; that he followed through on his part; that however, the Petitioner did not honour the agreement to pay and instead, she issued a cease and desist letter to the creditor and that through the Petitioner's actions the company's solid financial position and smooth operations have been crippled and exposed the 2<sup>nd</sup> Respondent to legal and financial claims from regulators and third parties.
9. For the foregoing reasons, the 2<sup>nd</sup> Respondent objected to the winding up of the company, citing that this Petition is a mischievous attempt by the Petitioner to avoid her obligation to the company. He lamented that the Petitioner severally declined and failed to meet with the company's creditors and has not notified them, including Mustek, about this Petition. He further complained that the Petitioner failed to provide him with the company's records despite her operating her company, Angelica Medical Supplies Limited, from the company's registered office.
10. The 2<sup>nd</sup> Respondent contended that the Petitioner can resign after she has fulfilled her obligation to the company to pay the contribution of Kshs 1,353,387.74/= towards settlement of the outstanding debt and that this was communicated to her by his advocates in response to her resignation letter and demand.
11. The 2<sup>nd</sup> Respondent urged the Court to dismiss the Petition with costs, arguing that there is no justifiable reason for the winding up of the company and that the Petition is vexatious and lacks foundation and merit.

## Analysis and Determination

12. I have considered the Petition, the rival affidavits, submission and authorities. To my mind, the only issue that arises for determination by the Court is "whether the Petitioner has made a case for liquidation of the Company; Microclinic Technologies Limited." I note that this is a Petition for liquidation by the Court brought by a member of a company. The Petitioner has argued that the company ought to be liquidated on the grounds that the company is unable to pay its debts and that it is just and equitable that the company should be liquidated.
13. The Petition is brought under Section 424 (1) (g) and Section 425 of the [Insolvency Act](#) and [Regulation 77B](#) of the Insolvency (Amendment) Regulations, 2018, which provide as follows: -

"Paragraph 424.

Circumstances in which company may be liquidated by the Court

1. 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) Being a public company that was registered as such on its original incorporation-
    - i. The company has not been issued with a trading certificate under the *Companies Act*, 2015; and
    - ii. More than twelve months has elapsed since it was so registered;
  - c) The company does not commence its business within twelve months from its incorporation or suspends its business for a whole year;
  - d) Except in the case of a private company limited by shares or by guarantee, the number of members is required below two;
  - e) The company is unable to pay its debts;
  - f) At the time at which a moratorium for the company ends under Section 645- a voluntary arrangement made under Part IX does not have effect in relation to the company; or
  - g) The court is of the opinion that it is just and equitable that the company should be liquidated.
2. A company may also be liquidated by the court on an application made by the Attorney General under Section 425(6).

“425. Applications to the Court for liquidation of companies

- (1) An application to the Court for the liquidation of a company may be made any or all of the following—
    - (a) the company or its directors....”
 

“Regulation 77B of the Insolvency (Amendment) L.N. 7/2018

“77B. Liquidation by court

      1. For the purposes of section 425 of the Act an application 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.
14. From the foregoing, it is clear that Regulation 77B (2) (b) requires that a liquidation Petition based on indebtedness must be accompanied by a statement of financial position in Form 32 set out in the First Schedule. Form 32 contains a statement of financial position depicting 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.

15. The Petitioner exhibited a Company statement of account for Mustek East Africa Limited marked as 'MWM-3' showing entries of the opening balance of Kshs 3,770,171.00/= on 31<sup>st</sup> December 2015; the posting of correct opening balance of Kshs 2,706,775.48/- on 1<sup>st</sup> July 2016 and cheque deposit of Kshs 26,540/= Cheq-001614 and its reversal on 10<sup>th</sup> April 2019. To my mind, this statement does not conform to Form 32 set out in the First Schedule. The said statement must be in relation to the company sought to be wound up, in this case, Microclininc technologies Limited and not from a company seeking to recover a debt from the purported insolvent company. It is therefore clear that the Petitioner has failed to demonstrate that the liabilities of the Company exceed the assets of the company and that she has provided insufficient evidence to support her petition for winding up. From the response by the co-director and 2<sup>nd</sup> respondent herein, the company and its directors had found a solution to the debt by Mustek and therefore it was a non-issue and cannot be the basis upon which the Petition has been filed. The absence of a proper form 32 as envisioned by the law is a proper basis for striking out the Petition. The Liquidation Petition is therefore incompetent as filed and this court will not seek to determine the question of whether the company is unable to pay its debts as there is nothing placed before the court to consider.
16. The second ground that the Petitioner put forth is that it is just and equitable for the company to be liquidated. On this ground, the guiding principle is that the Court will not allow a Petition for winding up of a company by a member on grounds that it is just and equitable where there is an alternative remedy. This was the holding in the case various decisions; see *Re A Company*, [1983] 1 WLR 92, *Dalkeith Investments Pty Ltd* (1985) 3 ACLC, *In the matter of Leisure Lodge Limited* (Winding Cause No. 28 of 1996), *Vadga Establishment v Yashvin Sbretta & 10 others* (C.A. No. 83 of 2000), *Mohamed Yusufali & Another v Bharat Bhardwaj & Anor* (2007) eKLR, *Siro Brugnoli & another v Giancarlo Camerucci & another* (Winding-Up Cause No. 23 of 2015) [2016] eKLR.
17. In this matter, it is common ground that the Petitioner and the Respondent are 50-50 shareholders in the company, each holding 500 shares each. Their respective affidavits and exhibits show that they reached a deadlock with regard to the company's outstanding Kshs 2,706,775.48/= to Mustek East Africa Limited (Mustek). The deadlock is mainly with respect to the debt owed to Mustek for the supply of tablets. Both the Petitioner and 2<sup>nd</sup> Respondent claimed not to have either negotiated, entered into the agreement with Mustek or to know the whereabouts of the tablets supplied by Mustek.
18. The Petitioner submitted that the existence of a 50-50 deadlock is a sufficient basis for the Court to wind up the company and that there is no available alternative remedy. On the other hand, the 2<sup>nd</sup> Respondent's position is that there is an available remedy because the Petitioner earlier agreed at a meeting to pay half of the amount owed to Mustek but reneged and that if she meets her obligation as earlier agreed, she can resign as a director and forfeit her shares.
19. In my considered view, the allegations with respect to the agreement with Mustek and the outstanding debt as well as the other allegations made by the Petitioner and the 2<sup>nd</sup> Respondent against each other with respect to mismanagement, oppression, failure to hold board meetings as required and failure to avail the company's financial statements and books of account are matters that are best resolved through a civil action, not a winding up Petition as they require more than affidavit evidence, hearing and cross-examination. These are therefore not proper grounds for winding up. See *Siro Brugnoli & another v Giancarlo Camerucci & another* [supra]



20. In *Edwin Kipng'eno Rono v Leawin Limited & another* (Petition No. E029 Of 2018) [2019] eKLR, cited in the Petitioner's submissions, the Court observed that:-

“70. In *Jasbir Singh Rai and 3 others v Tarlochan Singh Rai and 13 others* Civil Appeal 63 of 2001 .....The court further stated that at the stage when it comes to dealing with breaches of fiduciary duties and remedies sought in the Petition, the Company court should down tools and say “please go to a regular civil Court by way of plaint”. In considering whether or not the Respondent's application can be entertained it was held that it is not in the place of the court to consider the alleged wrongs of the Respondent as pleaded in the Petition as the only thing that the court needs to concern itself is whether there is an alternative remedy made.”

21. In view of the foregoing, I am not satisfied that the Petitioner has demonstrated that it is just and equitable for the company to be wound up and that there is no alternative remedy to resolve the issues affecting the Company operations.

22. The upshot is that liquidation Petition dated 19<sup>th</sup> September 2020 is dismissed with costs.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 5<sup>th</sup> DAY of MARCH, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Ms. Wangui for the Petitioner

Mr. Komu for the 2<sup>nd</sup> Respondent

Amos- Court Assistant

