



Solcah Enterprises Limited v Delta Construction Company Limited (Insolvency Petition E033 of 2022) [2024] KEHC 3856 (KLR) (Commercial and Tax) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3856 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E033 OF 2022**

MN MWANGI, J

APRIL 12, 2024

BETWEEN

SOLCAH ENTERPRISES LIMITED PETITIONER

AND

DELTA CONSTRUCTION COMPANY LIMITED RESPONDENT

JUDGMENT

1. The petitioner/creditor filed an Insolvency Petition dated August 22, 2022 against the respondent/debtor seeking the following orders -
 - i. That the company, Delta Construction Company Limited, be declared insolvent and be liquidated under the provisions of the *Insolvency Act*, No. 18 of 2015;
 - ii. That this Honourable Court appoints the Official Receiver as the Liquidator;
 - iii. That the costs of this petition be granted to the petitioner and be paid out of the assets of the company on priority; and
 - iv. That the Honourable Court makes such order as may be necessary and just in the premise.
2. The petitioner's case is that on diverse dates between July 24, 2020 and August 10, 2020, it sold various quantities of diesel to the respondent at preferential rates with a total value of Kshs.4,495,000/=, with the price of each sale being invoiced soon after delivery. The petitioner contended that by 5th August, 2020, the respondent had paid Kshs.899,000/=, thus as at 7th July, 2021, the respondent owed it Kshs.3,596,000/=. Due to the outstanding debt, the petitioner instituted recovery proceedings against the respondent vide a plaint dated 1st February, 2021 in Milimani CMCCOMM No. E112 of 2021, where the Trial Court entered interlocutory judgment for Kshs.3,596,000/=, plus interest and costs. That thereafter, the petitioner extracted a decree for the sum of Kshs. 3,964,543.13 all inclusive.



3. It was stated by the petitioner that it issued the respondent with a notice of intention to execute the decree dated 7th July, 2021 but the said notice elicited no response, hence it applied for warrants of attachment of property in execution of the decree, but the said warrants were returned by the Auctioneers unsatisfied. The petitioner asserted that on 5th July, 2022 it served a statutory demand on the respondent for payment of the outstanding debt of Kshs.3,964,543.13, but the respondent has failed to comply with the said demand thus necessitating this petition. The petitioner stated that the respondent is unable to pay its debts thus it should be liquidated.
4. The petition proceeded for hearing by way of formal proof. In support of its case, the petitioner called Mr. Solomon Kihohia Mbayu who testified as PW1. It was his evidence that it was agreed between the parties herein that payment was to be made within seven days of delivery of the petroleum product (diesel). That he asked for payment for the diesel supplied to the respondent from Mr. Samuel Ndungu, the respondent's Director, but he declined to pay. To prove the petitioner's case PW1 produced copies of delivery notes as exhibits 1 (a-f), copies of invoices as exhibits 2 (a-g), the petitioner's Board resolution as exhibit 3, letter of authority as exhibit 4, notice of entry of judgment as exhibit 5, notice of intention to execute as exhibit 6, an amended decree as exhibit 7, and warrants of attachment as exhibit 8.
5. Despite service and advertisement of the petition herein in one of the local daily newspapers, the respondent neither filed any pleadings in opposition to this petition, nor did he cross-examine the petitioner's witness. The instant petition therefore proceeded undefended.
6. At the close of the petitioner's case, this Court directed the petitioner to file written submissions. The same were filed by the law firm of Danlex Partners LLP Advocates on 12th February, 2024.
7. Ms. Awuor, learned Counsel for the petitioner cited the provisions of Sections 384(1) & (2), 424(1), 425(1)(b) of the *Insolvency Act* and submitted that a statutory demand dated June 24, 2022 demanding for payment of Kshs.3,964,543.13 was served on the respondent on July 7, 2022, but the respondent neither complied with it nor sought for it to be set aside by the Court. Counsel relied on the decisions in *Tristar Transport Ltd v East African Logistics Ltd* [2020] eKLR and *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd* (Insolvency Cause E006 of 2021) [2022] KEHC I2 (KLR) and submitted that the petitioner has fulfilled all the conditions outlined in section 384(1) of the *Insolvency Act*, thus it has discharged its burden of proof as mandated by the law.
8. She further submitted that the petitioner holds an unexecuted decree dated July 7, 2021 against the respondent but it has been unable to execute it despite numerous attempts to do so. For that reason, the petitioner was apprehensive that there are no reasonable prospects of the respondent settling the debt that is due and owing to it. The petitioner's Counsel stated that it is not only fair and just but also equitable that a liquidation order is issued against the respondent, and for the Official Receiver to be appointed as a provisional Liquidator. She prayed for costs of this petition to be paid out of the respondent's assets in priority.

Analysis And Determination.

9. On consideration of the pleadings filed by the petitioner, the evidence on record, and the written submissions by Counsel for the petitioner, the issue that arises for determination is whether a liquidation order should issue against the respondent.
10. It is not in dispute that the petitioner has a valid decree against the respondent for the sum of Kshs.3,964,543.13 which was issued on 7th July, 2021 as a result of an *ex parte* judgment entered on April 20, 2021 in favour of the petitioner as against the respondent in Milimani CMCCOMM No. E112 of 2021. Further, no evidence has been adduced before this Court to show that the



aforementioned judgment and decree have been stayed, set aside, varied and/or altered by a Court of competent jurisdiction. There is also no evidence that the respondent has fulfilled or attempted to fulfill the said decree by paying the petitioner the entire or part of Kshs.3,964,543.13 being the decretal sum.

11. The petitioner herein has successfully demonstrated that it attempted to execute the aforesaid decree by issuing the respondent with a notice of intention to execute a decree dated 7th July, 2021 which elicited no response, thus it applied for warrants of attachment of property in execution of the decree, but the warrants were returned unsatisfied. In view of the petitioner's inability to execute the decree issued in its favour on 7th July, 2021 despite several attempts, it opted to institute insolvency proceedings against the respondent as provided for under section 425(1)(b) of the *Insolvency Act*, 2015. The said provisions state as hereunder-

“An application to the Court for the liquidation of a company may be made any or all of the following-

- a. ...;
- b. a creditor or creditors (including any contingent or prospective creditor or creditors)...

12. The instances under which a Company may be liquidated by the Court are provided for under section 424(1) of the *Insolvency Act*, 2015 which provides 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. 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* (Cap. 486); 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 reduced 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.” (emphasis added).



13. The petitioner is seeking an order for liquidation to be made as against the respondent on grounds that the latter is unable to pay its debts. Section 384 of the [Insolvency Act](#), 2015 provides the circumstances in which a company may be deemed as being unable to pay its debts in the following words:

- “(1) For the purposes of 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 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).
3. The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).”

14. As explained earlier, the petitioner has a valid decree against the respondent which it has been unable to execute. It took out warrants of attachment against the respondent but the said warrants were returned unsatisfied by Icon Auctioneers and Sannex Enterprises Auctioneers. Consequently, on 5th July, 2022, the petitioner served on the respondent a statutory demand dated 24th June, 2022 demanding payment of the decretal sum being Kshs.3,964,543.13, but the respondent failed to comply with the said demand, necessitating these proceedings. As such, I am persuaded that the petitioner has demonstrated on a balance of probabilities that the respondent is indebted to it in the sum of Kshs.3,964,543.13 and is unable to the decretal amount in favour of the petitioner arising from an exparte judgment entered against the it on 20th April, 2021, and the resultant decree for the said amount issued on 7th July, 2021.

15. The Court of Appeal in the case of [Pride Inn Hotels and Investments Limited v Tropicana Hotels Limited](#) [2018] eKLR, Visram JA., reading the majority judgment of the Court, had this to say on the issue of liquidation-

“This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. 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 added).

16. Ultimately, this Court finds that there is sufficient evidence to grant the prayers sought. The petition herein is allowed in the following terms -
- i. That Delta Construction Company Limited is hereby declared insolvent and is hereby liquidated under the provisions of section 424(1)(e) of the *Insolvency Act*;
 - ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed as the Liquidator of the respondent’s properties; and
 - iii. Costs of the petition shall be borne out of the respondent’s assets.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Awuor for the petitioner

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

