



**Chic Tava Limited v Kenchic Limited & 6 others (Insolvency Petition 10 of 2016)
[2024] KEHC 5353 (KLR) (Commercial and Tax) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5353 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION 10 OF 2016**

FG MUGAMBI, J

MAY 17, 2024

BETWEEN

CHIC TAVA LIMITED PETITIONER

AND

KENCHIC LIMITED 1ST RESPONDENT

KIM'S POULTRY FARM 2ND RESPONDENT

SIGMA SUPPLIES LIMITED 3RD RESPONDENT

DIAMOND TRUST BANK 4TH RESPONDENT

M'ORIENTAL BANK LIMITED 5TH RESPONDENT

THE RECEIVER MANAGER, CHASE BANK LTD 6TH RESPONDENT

THE RECEIVER MANAGER, IMPERIAL BANK LTD 7TH RESPONDENT

JUDGMENT

Background

1. The petitioner, Chic Tava Limited, filed a debtor's liquidation petition dated October 18, 2017 under article 159 of the [Constitution](#), sections 423, 424 and 425 of the [Insolvency Act, 2015](#) and rule 10 of the [Insolvency Regulations, 2016](#). The petition seeks orders for liquidation and that the official receiver be appointed as provisional liquidator of the debtor company.
2. The petitioner also filed an affidavit verifying the petition sworn by its director, Ali Shamsudin Dawoodon even date and a statement of financial position pursuant to leave of court granted on November 1, 2019.



3. The petitioner is a private limited liability company incorporated under the *Companies Act* 2015 under registration PVT/2016/012957 as a conversion from a business name. It has a nominal share capital of Kes 100,000 divided into 100 shares of Kes 1000 each. It was engaged in buying and selling of meat and meat products. According to the petitioner its clients would issue post-dated cheques and it had an arrangement for discounting the cheques with Imperial Bank Limited (in receivership). It faced financial challenges due to the receivership of its bankers and bouncing of some of the cheques.
4. The petitioner's case is that it is unable to pay its debts which stand at over Kes 1,000,000/- and has by special resolution dated December 15, 2016 resolved that it be liquidated by the Court and that it is just and fair that it is liquidated.

Responses

5. The 2nd respondent, Kim's Poultry Farm, filed grounds of opposition to the petition, dated September 30, 2019. The 2nd respondent contends that the petition is premature and made in bad faith as it is not accompanied by a statutory demand in the prescribed form or a statement of financial position and assets to determine whether the company is unable to pay its debts. As far as the 2nd respondent is concerned, the petitioner has not satisfied this Court that voluntary liquidation would be in the interests of the creditors.
6. The 4th respondent, Diamond Trust Bank, filed an affidavit of proof of debt sworn by its assistant legal officer, Joram Kilwanda as well as written submissions in support of the liquidation petition. It was confirmed that the 4th respondent had advanced the petitioner an overdraft facility of Kes 2,500,000/- which the petitioner persistently defaulted in payment.
7. The 4th respondent also confirmed that the petitioner's account was overdrawn to the sum of Kes 8,187,383.74 as at March 30, 2022 which amount continues to accrue due to non-payment by the petitioner. As such, the respondent prayed for an order for liquidation and that its debt be considered preferentially.
8. The 5th respondent, M'Oriental Bank Limited, filed a replying affidavit sworn by its employee, Wilfred K. Machini on August 19, 2019 and written submissions in support thereof. For the avoidance of doubt, the 5th respondent also supports the liquidation petition. The 5th respondent confirms the debt due from the petitioner, being Kes 6,538,364.14 as at July 31, 2019, which is evidenced by the statement of accounts filed before the court. The debt arises from a secured facility that was advanced to the petitioner and as such the 5th respondent prays that its debt is prioritized by virtue of being a secured creditor.
9. The 7th respondent, who is the Receiver Manager, Imperial Bank Limited (In receivership) filed a replying affidavit sworn by its legal officer, Andrew Wamicwe on January 28, 2020. The respondent asserted that between June 2012 and January 2015, it had extended financial facilities to Ali Shamsudin Dawood, the petitioner's director, and not to the petitioner as it had not been converted into a company. It contended that the said director had filed this petition to avoid paying his debts. It highlighted that this petition had been brought 6 months after the company's incorporation on May 27, 2016.

Analysis and determination

10. I have considered the petition, the parties' respective affidavits, submission and authorities. The issue for determination is whether the petitioner has made a case for liquidation. This is a petition for



liquidation by a debtor under section 425 of the *Insolvency Act*, on the basis that the company is unable to pay its debts and that it is just and equitable that the company should be liquidated.

11. Section 424 of the *Insolvency Act* provides for 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).”

12. The evidence to be taken into account in establishing that a company is unable to pay its debts are set out under section 384 of the *Insolvency Act*, as follows:

- “(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).”

13. The import of section 384 is that inability to pay debts is a matter to be proved though evidence. In *Osman v First Community Bank & 2 others* (Insolvency Petition E037 of 2020) [2022] KEHC 13825 (KLR) (Commercial and Tax) (23 September 2022) (Judgment), the Court observed that:

“Inability to pay debts is a fact to be proved by evidence. It is not to be assumed that because the petitioner says that he is unable to pay debts the court should believe his word of mouth. A petitioner who wants to be adjudged bankrupt must lay before court concrete evidence to enable the court make a determination based on that evidence that indeed the person in bankrupt. The court cannot not act as an aid instrument to allow a person run away from his financial obligation towards his creditors. This is so because once adjudged bankrupt, the debtor is tossed beyond his creditors’ reach.”

14. In *Kenya Artisans Limited v Chemical & Allied Workers Union*, [2021] eKLR, the Court further observed that:

“The Act confers the court with wide judicial discretion. However, if the court finds that a Petition to liquidate a Company is not brought in good faith (such as to evade lawful debts), it would certainly dismiss it with costs. This was the holding in *Matic General Contractors Limited v The Kenya Power and Lighting Company Limited*. The requirements of the Act as far as voluntary winding up on account of inability to pay debts are satisfied when the debtor is unable to pay his or her debts. A person (or a company) is insolvent when he/it is unable to pay his/its debts. In legal terms, however, the test for insolvency is whether or not the debtor's liabilities, fairly estimated, exceed his/its assets, fairly valued. Inability to pay debts is, at most, merely evidence, and in itself, of insolvency. When the word “insolvent” is used to describe a debtor, it carries two possible meanings - either that the debtor's estate has been sequestrated; or that his liabilities exceed his assets.

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.

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.”

(Emphasis added)



15. Regarding the submission by the respondents that there is no statutory demand accompanying the petition, it is my finding that under section 384 of the [Insolvency Act](#), the service and non-compliance with a statutory demand is only but one way of determining solvency but not the only means.
16. From the record, I note that the petitioner's director initially registered Chic Tavaas a sole proprietorship on October 22, 1998. On May 27, 2016, Chic Tava Limited was incorporated as a private company limited by shares. The petitioner claimed that it is unable to pay its debts due to financial constraints caused by receivership of its bankers and bouncing of some cheques.
17. Imperial Bank Limited (in receivership) opposed the petition on the basis that it extended financial facilities to AliShamsudin Dawood and not to Chic Tava Limited as it had not been converted to a company. Therefore, the contention that the petitioner was facing financial constraints due to the receivership of Imperial Bank Limited (in receivership) is not supported.
18. That said, the creditors and the amounts owed to them are as tabulated below:

Creditor	Debt
Kenchic Limited	Kes 10,326,994
Kim's Poultry Farm	Kes 3,000,000
Sigma Supplies Limited	Kes 500,000
Diamond Trust Bank	Kes 2,500,000
M'Oriental Bank Limited	Kes 4,824,729.42
Receiver, Chase Bank Limited	Kes 1,000,000
Receiver, Imperial Bank Limited	Kes 10,000,000
Barclays Bank Credit Card	Kes 1,000,000
NIC Bank Credit Card	Kes 2,500,000
Post Bank Credit Card	Kes 300,000
Chase Bank Credit Card	Kes 100,000
Spire Bank Credit Card	Kes 500,000
DTB Credit Card	Kes 300,000
Imperial Bank Credit Card	Kes 300,000

19. The evidence produced by the 1st and 7th respondents revealed that some of the debts listed above emanated from credit facilities that were extended to the petitioner's director Ali Shamsudin Dawood and not to Chic Tava Limited directly.



20. One such case is the October 13, 2022 order whereby this court allowed an application by the 1st respondent, Kenchic Limited, to be struck out from the proceedings on grounds that it was wrongly enjoined as it was not owed any money by the petitioner but that it was owed Kes 10,270,146/- by Ali Shamsudin Dawood for which it has filed a recovery claim in HCCC No. E9610 of 2021. It is important to reiterate the point that a company is a distinct entity from its shareholders and directors, a concept that is as old as the case of *Salomon v Salomon*.
21. On their parts, the 4th and 5th respondent, Diamond Trust Bank Limited and M'Oriental Bank Limited, furnished evidence that they are owed Kes 8,187,383.74 and Kes 4,824,729.42/- respectively by the petitioner. I note that the amount claimed by Diamond Trust Bank Limited does not correspond to the amount reflected in the petitioner's statement of financial position.
22. This court notes that there are no assets listed in the statement of affairs filed by the petitioner so as to enable the Court assess the assets against the liabilities of the petitioners and determine the petitioner's solvency. There is also no indication of the estimated total assets available for preferential creditors. This court is therefore not in a position to determine whether the petitioner is in a position to satisfy the debts due to the 4th and 5th respondents.
23. As such, the petitioner has not satisfied this Court that voluntary liquidation can be continued with due regard to the interests of the creditors. What is more, the fact that some of the debts which are attributed to Mr. Ali have been listed in the petitioner's statement of financial position, is a clear demonstration that the petition has not been brought in good faith and it is an attempt by Mr. Ali to evade payment of his debts.
24. On the whole, therefore, I find that the petitioner has not proven that it is genuinely unable to pay its debts and should be liquidated.

Disposition

25. In conclusion, the petition is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

