



Kagwimi Kang'ethe and Company Advocates v Olerai Nurseries Limited (Insolvency Cause E008 of 2019) [2023] KEHC 3119 (KLR) (Commercial and Tax) (6 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3119 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E008 OF 2019
DAS MAJANJA, J
APRIL 6, 2023
IN THE MATTER OF THE INSOLVENCY ACT, 2015
AND IN THE MATTER OF
OLERAI NURSERIES LIMITED

BETWEEN

KAGWIMI KANG'ETHE AND COMPANY ADVOCATES APPLICANT

AND

OLERAI NURSERIES LIMITED PETITIONER

JUDGMENT

1. Olerai Nurseries Limited (“the Company”) was incorporated on September 24, 1997, with a nominal capital of Kshs 100,000/- divided into shares of Kshs 100/-each. The amount of the capital paid up or credited as paid up is Kshs 100,000/-. It was established for various objects among them to carry on the business of farming in all its branches, the business of horticulturalists and seed merchants and to acquire or erect green houses and any other premises for the promotion of the speedy growth of flowers, crops, vegetables, fruits and to sell all such produce.
2. Anthony George Combos and Penelope Combos, the Directors of the Company moved the court by way of Liquidation Petition dated June 24, 2019, (“the Petition”) under section 425 of the *Insolvency Act* (“the Act”). The Petition seeks an order for its liquidation on the basis that it has ceased operations, it is unable to meet its financial obligations to creditors and suppliers particularly the firm of Kagwimi Kang'ethe & Co Advocates which it owes Kshs 1,364,623.00 together with interest at court rates from October 12, 2017.



3. The Petition is accompanied by the verifying affidavit of Anthony George Combos to which he attaches a Resolution for the Special General Meeting of the Company held on June 18, 2019 (“the Resolution”). The Resolution is to the effect that the Company be wound up and struck off the register of companies as it is unable to pay its debts and that the firm of LJA Associates Advocates LLP be appointed to represent it during the liquidation process.
4. After presentation, the Company advertised the Petition in The Standard Newspaper on Friday March 18, 2022 as well as through Gazette Notice No 3353 of Kenya Gazette Vol CXXIV-No 53 on Friday March 25, 2022. The firm of Kagwimi Kang’ethe & Company Advocates (“the Creditor”) filed a Notice of Intention to Appear and Oppose the Petition and a replying affidavit sworn by George Kang’ethe, Advocate on October 5, 2021.
5. Both parties have filed written submissions in support of their respective positions. Prior to the hearing of this petition, the Creditor filed a preliminary objection to the effect that the Petition was incompetent and that the court lacked jurisdiction to entertain it. I dismissed the preliminary objection by the ruling delivered on July 28, 2022 and held as follows:

Looking at the substance of the proceedings, I hold that the Company complied with the requisite procedures for liquidation by the court under section 425(1)(a) of the *Insolvency Act*. I find that while the Resolution did not specifically indicate whether the liquidation was voluntary or by court, the provisions of the law cited, the procedure followed clearly show that the liquidation was intended to be by the court. Finally, I do not find any prejudice to any of the Company’s creditors. As this is Petition for liquidation by court, I hold that this court has jurisdiction by dint of section 423(1) of the *Insolvency Act*.

6. The Creditor opposes the application based on the provisions of section 431(b) of *Insolvency Act* which states:

431(1) If, before the making of an application for the liquidation of a company by the court, a resolution has been passed by the company for liquidating the company voluntarily:-

- a. the liquidation commences at the time of the passing of the resolution; and
- b. unless the court, on proof of fraud or mistake, directs otherwise, all proceedings taken in the voluntary liquidation are to be regarded as having been validly taken.

7. The Creditor argues that the court has the discretion, duty and power to interrogate whether the voluntary liquidation process commenced by the Company is bona fide and to decline to issue a liquidation order if there is evidence of mala fides. I agree that the court may disregard action taken on a voluntary liquidation if fraud or mistake is proved and not merely malafides. In relation to this case however, I would point out that in the ruling dated July 28, 2022, I held that this liquidation is a liquidation by the court under Division 6 of the *Insolvency Act*. I further determined the procedural propriety of the petition and held it was properly before the court.
8. A company may be liquidated by the court on any of the grounds set out in section 424(1) of the *Insolvency Act* and more particularly subsection (a) which provides that a company may be liquidated by the court if, “the company by special resolution resolved that the company be liquidated.” This is an independent and stand-alone ground apart from the ground of inability to pay debts. A company’s shareholders may resolve to liquidate the company notwithstanding it is still able to pay its debts. In



this case though, the directors contend that they are unable meet their financial obligations including payment of the Creditor.

9. I am satisfied that a resolution to liquidate the Company has been passed and there is no reason why it should not be liquidated. The Creditor shall be at liberty to file its claim for resolution before the liquidator.
10. I therefore allow the petition and order as follows:
 - a. An Interim Liquidation Order be and is hereby issued in respect of the Company, Olerai Nurseries Limited;
 - b. The Official Receiver be and is hereby appointed as the Provisional Liquidator;
 - c. The costs of the petition shall be in the liquidation

DATED and DELIVERED at NAIROBI this 6th day of APRIL 2023

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango.

Ms Dave instructed by LJA Associates Advocates for the Respondent/Petitioner.

Mr Kang'ethe instructed by Kagwimi Kang'ethe and Company Advocates for the Applicant/Creditor

HC IN CAUSE NO. E008 OF 2019 RULING 2 | Page

