



**Kagwima Kengethe & Co Advocates v Vulcan Lab Equipment Limited (Insolvency Petition 5 of 2017) [2023] KEHC 22615 (KLR) (Commercial and Tax) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22615 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION 5 OF 2017**

**EC MWITA, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**KAGWIMA KENGETHE & CO ADVOCATES ..... PETITIONER**

**AND**

**VULCAN LAB EQUIPMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is a petition by the Kagwima Kangethe & Co Advocates, (the petitioner), to liquidate Vulcan Lab Equipment Limited, (the company), for inability to pay a debt of Kshs. 9,775,334 together with interest at court rates. This amount arose from decrees in HCCC Misc. Cause No. 474 of 2013. The company is further indebted to the petitioner in the sum of Kshs. 695,019 together with interest at court rates. The amount arose from JR No. 80 of 2014.
2. The petitioner asserts that on 10<sup>th</sup> November 2016, a demand letter dated 8<sup>th</sup> November 2016 was served on the company both by hand delivery and registered post, but he demand was ignored.
3. The petition is supported by affidavits and documents in support to prove the debt. The petitioner believes that the company is unable to pay its debts because it is insolvent and, therefore, should be liquidated.
4. The company though served, did not file a response to the petition. On 3<sup>rd</sup> February, the court issued directions that the company file a response to the petition within 14 days; that the petition was to be disposed of through written submissions and directed parties to files and exchange their written submissions. The petitioner filed submissions but the company did not.
5. The company's advocate attempted to withdraw at the last minute on the day the matter had been set down for hearing, but the court declined because this was intended to delay the matter given that time



the counsel had taken to make up their mind and again the application had not even been served on the company.

6. The petition was disposed of through the pleadings filed by the petitioner and their written submission, which the court has read and considered.
7. This being a petition to liquidate the company, section 424(1)(e) of the *Insolvency Act* (the Act) provides that a company may be liquidated if it is unable to pay its debts.
8. Section 2 of the *Act* defines “debt” as the obligation or liability of a person to pay money or money’s worth, which includes liability under a written law, liability under a contract/bailment or liability arising from an obligation to make restitution, among others.
9. Section 384 of the *Act* states that a company is unable to pay debts where a creditor to whom the company is indebted for hundred thousand or more, has served a 21 days written demand requiring the company to pay the debt, but the company fails to pay or take any other steps towards payment to the satisfaction of the creditor, or execution or other process issued on a judgment, decree, order of any court in favour of the creditor is returned unsatisfied in whole or part.
10. The law, requires that a petitioner have a legitimate claim and the company must have failed to settle the claim or pay the debt after service of the notice as required by sections 384 and 424 of the *Act* before a petition to liquidating the company is filed.
11. The petitioner asserted that the company owes the money, has an obligation to pay the debt as a requirement of law but failed to do so even after the notice was served.
12. The question before this court is whether the petitioner has satisfied the requirements of the law to mount a successful petition to liquidate the company. Put differently, has the petitioners proved that the company owes the amount claimed in the petition but is unable to pay the debt?
13. I have perused the petition and supporting documents. There is no doubt that there are decrees issued in favour of the petitioner against the company. From the decrees, the company owes the debt shown in those decrees. I have also seen a copy of the statutory notice served on the company. The company did not deny service of the statutory notice and did not allege that debt is not due.
14. The company was given an opportunity to respond to the petition but did not, leaving the petition to proceed unopposed. Counsel for the company attempted to withdraw on the date set for hearing but the court declined to entertain such a scheme having come too late in the day.
15. The tests for determining whether a company should be wound up were well stated in *Re: The India Electric Works v Unknown* AIR 1970 Cal 398, citing *Re Cine Industries and Recording Co. Ltd*, AIR 1942 Bom 231, thus:

The test for determining whether a company should be wound up is whether the company is commercially insolvent at the date of the petition for winding-up. The expression ‘commercially solvent’ means that the existing assets and the liabilities of the company are such as to make it reasonably certain that the existing and probable assets would be sufficient to meet the existing liabilities.

The other test is whether at the date of the presentation of the winding-up petition, there was any reasonable hope that the object of trading at a profit with a view to which a company was formed would be attained.

(see also *Davies and Co. Ltd. v. Brunswick (Australia) Ltd.*, (1936) 1 All ER 299).



16. In a liquidation petition, the petitioner bears the burden to prove that the company is unable to pay its debt(s) and is, therefore, commercially insolvent and has no reasonable hope of trading at a profit for which it was formed.
17. In this petition, the petitioner has demonstrated that the company is indeed indebted to them. This debt was not denied. The petitioner served a statutory demand on the company which did not elicit any response in terms of payment or denying the debt. The petition was also served, and even though the company appointed an advocate to represent it, no response was filed, even after the court gave the Advocate an opportunity to file a response and submissions,
18. The petitioner having demonstrated that the company is justly indebted to them and that there is no bonafide dispute over that debt, the burden shifted to the company to show that it is commercially solvent and should be given an opportunity to trade. In the circumstances, I am satisfied that the company is unable to pay its debts and is, therefore, insolvent.
19. Consequently, and for the above reasons, this petition succeeds and is allowed.
20. Vulcan Lab Equipment Limited is hereby declared insolvent and liquidated. The Official Receiver is appointed as the Liquidator. The petitioner shall have costs of the petition, to be paid out of the assets of the company

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023.**

**E C MWITA**

**JUDGE**

