



**Dune Packaging Limited v Korara Highlands Tea Factory (Insolvency Cause E005 of 2023) [2024] KEHC 15379 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15379 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
INSOLVENCY CAUSE E005 OF 2023  
JK SERGON, J  
NOVEMBER 21, 2024**

**BETWEEN**

**DUNE PACKAGING LIMITED ..... PETITIONER**

**AND**

**KORARA HIGHLANDS TEA FACTORY ..... RESPONDENT**

**RULING**

1. Dune Packaging Limited (hereinafter referred to as “the Petitioner”) is a Limited Company incorporated in Kenya pursuant to the provisions of the Companies Act, 2015 and carrying on business in Kiambu within the Republic of Kenya.
2. Korara Highlands Tea Factory Limited (hereinafter referred to as “the Company”) is a limited liability company incorporated in the Republic of Kenya and having its operational offices in Kericho within the Republic of Kenya. The Company has within a period of one year preceding the presentation of this petition carried on business in Kericho within the jurisdiction of this Court.
3. The Petitioner outlined the circumstances leading to the Respondent's indebtedness as follows; That the Company was indebted to the Petitioner in the aggregate sum of Kenya Shillings One Million Four Hundred and Twelve Thousand and Nine Hundred and Forty and Eighty Cents (Kshs. 1,412,940.80/-).
4. That pursuant to a statutory demand dated 1st July, 2022 served upon the Company, the Company was able to offset part of the debt owed to the Petitioner to the tune of Kenya Shillings One Hundred Forty One Thousand and Two Hundred and Ninety Four (Kshs. 141,294.00/-) and therefore the outstanding debt remains to be One Million Two Hundred and Seventy One Thousand Six Hundred and Forty Six and Eighty Cents (Kshs. 1,271,646.80/-).
5. That the Petitioner does not, nor does any person on its behalf, hold any security on behalf of the Company's assets for the payment of the debt amount.



6. That the Petitioner has made repeated requests to the Company for the payment or part payment of the debt amount, but the Company has failed or neglected or refused to pay the debt amount.
7. That the debt owed to the Petitioner by the Company is within the prescribed insolvency level in accordance with the *Insolvency Act* and Rules.
8. That more than twenty one (21) days had lapsed since the petitioner served the statutory demand dated 25th August, 2022 on the Company for payment of the debt but no part of the debt had been settled by the Company.
9. That there was no application filed by the Company to set aside the statutory demand in respect of the debt owed by the Petitioner.
10. The Petitioner contended that the Company is unable and has no reasonable prospects of paying the debt and that in the prevailing circumstances it is therefore just and equitable that the Company should be liquidated.
11. The Petitioner was therefore seeking the following orders;
  - a) That the company Korara Highlands Tea Factory Limited be and hereby declared insolvent and liquidated under the provisions of the *Insolvency Act* No. 18 of 2015.
  - b) That this honorable court appoint an Insolvency Practitioner as the Liquidator.
  - c) That the cost of this petition be granted to the Petitioner and be paid out of the assets of the Company of priority.
  - e) That the honourable court makes such orders as may be necessary and just in the premise
12. The petition was supported by a verifying affidavit sworn by Rohin Chandaria the Director of the Petitioner with authority from the Board of Directors to swear the affidavit. He avers that he is conversant with the matters arising in the petition and confirmed that the factual background giving rise to the petition to be true.
9. The Company did not file any response to the petition, despite having been served with the instant petition.
10. The matter came up for hearing on 22nd October, 2024, Mr. Bwire Learned Counsel representing the Petitioner reiterated that the Respondent had not filed any response to the petition and the statutory demand, he therefore urged this Court to allow the petition as prayed.
11. Having considered the petition, verifying affidavit and supporting documents filed by the Petitioner, the sole issue for this Court's determination is whether the Petitioner has proven indebtedness on the part of the Company and is therefore deserving of the reliefs sought.
12. This being an insolvency matter and the relevant legal provisions are as follows; section 424 (1) (e) of the *Insolvency Act*, No. 18 of 2015 provides that a company may be liquidated by the court if the company is unable to pay its debts. Section 384 of the said Act sets out the circumstances in which a company is unable to pay its debts 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).
- (3) The insolvency regulations may increase or reduce the amount specified in subsection (1) (a) whereas section 425 (1) (b) of the *Insolvency Act*, No. 18 of 2015 and regulation 77B of the Insolvency (Amendment) Regulations, 2018 prescribe the procedure to be followed in an application for liquidation. Regulation 77B of the Insolvency (Amendment) Regulations, 2018 provides that:
- “(1) (1) For the purposes of Section 425 of the Act an application for liquidation 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.”

13. It is clear that in the instant petition the Company herein is unable to pay its debts due to the fact that the debt of Kshs. 1,271,646.80/- remains unsatisfied to date. It is therefore the finding of this Court that the Company's refusal and/or failure to settle the decretal amount is prima facie evidence that the Company is unable to pay its debt. However, this court prior to making any determination is duty bound to ensure that the insolvency petition filed against the Company is based on the process and procedure prescribed by the law. In *Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd (Insolvency Cause E006 of 2021)* [2022] KEHC 12 (KLR) (Commercial and Tax) (28 January 2022) (Judgment) Mabeya J. observed as follows; “Liquidating a company is a draconian step which amounts corporate execution. In *Kenya Power And Lighting Company Limited Vs. National Cereals & Produce Board (2002) 1 Klr 652*, Ringera J (as he then was) likened it to ‘passing a death sentence on an individual.’”



14. . Based on court record, it is evident that prior to the petition against the Company the creditors issued a statutory demand of the debt due and owing and the same remains outstanding.
15. However, the Petitioner has not supplied this Court with a statement of the financial position of the Company or demonstrated that they faced difficulties in obtaining a statement of the financial position of the Company in support of their petition.
16. It is the finding of this Court that the present petition does not satisfy all the foregoing requirements in regulation 77 (B) (1) of the Insolvency Rules.
17. This Court is alive to the wide powers given to it by section 427 of the *Insolvency Act* which provides that: - “On hearing a liquidation petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit...” Having failed to comply with the provisions of Regulation 77B, this Court finds that the Petition is unfounded and is incompetently before this Court. The same is hereby ordered struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 21ST DAY OF NOVEMBER, 2024.**

**J.K. SERGON**

**JUDGE**

In the presence of:

C/Assistant – Langat

Bwire for the Petitioner

Evanson Kirui holding brief for J. K. Mutai for Creditor

Miss Muthee holding brief for Kabiru for Creditors

