



Official Receiver and Provisional Liquidator v Even Business Park Limited (Insolvency Cause E013 of 2019) [2024] KEHC 14596 (KLR) (Commercial and Tax) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E013 OF 2019
JWW MONG'ARE, J
NOVEMBER 21, 2024**

BETWEEN

THE OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR PETITIONER

AND

EVEN BUSINESS PARK LIMITED RESPONDENT

RULING

1. The Official Receiver and the Provisional Liquidator of Countryside Dairy Limited (in Liquidation) filed the liquidation petition dated 3rd May 2023, seeking:-
 - a. A Liquidation Order be made against Countryside Dairy Limited (under administration).
 - b. The Official Receiver be appointed Liquidator of the company.
 - c. This Honourable Court makes such orders as may be necessary and just in the premises
 - d. Costs of this petition be provided.
2. The Petitioner also filed a verifying affidavit sworn on 3rd May 2023 by Advocate Diana Mumo, a Senior Assistant Official Receiver and written submissions dated 22nd August 2024.
3. The Petitioner's case is that Countryside Dairy Limited (under administration) (the company) was incorporated on 14th June, 2012 under the *Companies Act*, Cap. 486 (repealed) under Reg. No. CPR/2012/76612 as a processor of milk and milk products. The company's registered office was in Nyahururu, Laikipia County. The nominal capital of the company is Kshs. 5,459,000/= divided into 30,570 ordinary shares of Kshs. 100 each and 24,020 preference shares of Kshs. 100/= each.
4. The Company ceased operations in December, 2021. Its directors appointed the Official Receiver as the Administrator Notice of Appointment of Administrator on 6th May, 2022. The Company



- was then put under administration for one (1) year and its affairs as well as its assets vested with the Administrator.
5. The Company's directors indicated that the reasons for entering into Administration were the lack of capital to complete expansion projects already underway, and the loss of property and vital equipment through a court-sanctioned execution against the Company's assets.
 6. The total Book Value of its assets amounts to Kshs. 513,234,694/- while its liabilities are about Kshs. 585,284,967. The Company was unable to meet its obligations as and when they fell due as it was not generating any income.
 7. At the time of appointment of the Administrator, the Company had already ceased its operations for up to five (5) months and was therefore not generating any income. The Administrator was unable to revive the Company or maintain it as a going concern due to lack of funding and some equipment vital to its operations. Thus, the Administrator's opined that a realization of the assets of the Company under Section 522 (1) (c) of the *Insolvency Act*, in order to make a distribution to one or more secured or preferential creditors was the best outcome in the Administration.
 8. The Administrator has been able to sell secured assets worth eighty million and five hundred thousand shillings (Kshs. 80,500,000/-) and paid SBM Bank Kenya Limited (secured creditor) its debt in full. Stitching DOB Equity, a secured creditor, is yet to enforce its secured debt but has issued Statutory Demands.
 9. The Administrator has not been able to pay other creditors including preferential creditors since it was collecting other Company assets to make a substantial instalment payment.
 10. The Administrator has traced other company assets including a carton sealer, storage tank, aseptic pouch filler, UHT sterilizer, homogenizer, ink jet coder and an uninterrupted power supply (UPS) system and is in the process of retrieving the same. The said traced assets are the subject matter in Nakuru Civil Case No. E001 of 2022 - SBM Bank Kenya Limited v Geoffrey Ndungu Joseph T/A Venture Auctioneers & 2 Others which is ongoing.
 11. Due to the company's financially distressed position, some creditors have filed legal actions against the company and may obtain adverse orders against the company. Some of the creditors have made formal demands for payment by the Company and filed Proof of Debt Forms, which payment the Administrator will not be able to make in full.
 12. The company is insolvent with no likelihood of recovery. The Administrator's term automatically lapsed on 5th May, 2023.
 13. The Administration process having only achieved one of its purposes, ought to be converted into a liquidation so as to achieve the best possible outcome for the creditors. The purpose of this Liquidation Petition, filed in accordance with the *Insolvency Act*, is to ensure that the interests of all the Company's creditors are addressed and for benefit of ALL the company's creditors.

Response

14. The Creditor/ Respondent, Even Business Park Limited opposed the Petition through a replying affidavit sworn by its director, Pravin Varsani on 14th March 2024 and written submissions dated 31st September 2024.
15. The Respondent's case is that the administration process has not been carried out per the *Insolvency Act*; that the Petitioner did not respond to its request for further details about the insolvency petition



filed on 11th September 2023; that the Petitioner did not send the creditors a statement of proposal as required under Section 566 (4) (a) of the [Insolvency Act](#); that it only discovered that the Petitioner had filed a statement of proposal when it was produced in Court; that in the Proposal, the administrator proposed to proceed under Section 522 (b) of the [Insolvency Act](#) to achieve a better outcome for the company's creditors as a whole than would likely be the case if the company were liquidated without first being under administration; that the Petitioner failed to convene a creditors' meeting as required under Section 568 of the [Insolvency Act](#); that the Petitioner did not explain its change of course from partial achievement of the objective set out under Section 522 (b) of the [Insolvency Act](#) set out in the Proposal and that the Petitioner has not acted in the company's benefit.

16. The Respondent also faulted the Petitioner for failing to furnish any documents in support of the petition together with the company's bank statements for the period which the company was under administration; indicating that the secured creditor is yet to sell the charged properties but failing to explain why it did not seek to proceed under Section 588 of the [Insolvency Act](#) which empowers it to dispose of and deal with the charged property; non-floating charge which might help achieve a better outcome for the creditors by ensuring that the same are sold at the best possible price.
17. The Respondent further complained that the Petitioner has not provided details regarding the Kshs. 80,500,000/= recovered from the sale of the company's assets, which was allegedly used to offset a loan from SBM Bank; that the creditors will be prejudiced, if a liquidation order is made in the circumstances; and that the unsecured creditors will be left with unpaid debts and no way of recovering the same as all assets which are owned by the company would go to one of the shareholders who is the secured creditor.

Analysis and Determination

18. I have considered the petition, the parties' respective affidavits, submissions and authorities. The issues for determination are whether the Administration process was carried out per the [Insolvency Act](#), 2015 and whether the liquidation petition is merited.

Whether the Administration process was carried out per the [Insolvency Act](#), 2015

19. On the first issue, the Petitioner submitted that the administration process was carried out per the [Insolvency Act](#), detailing its actions.
20. On the other hand, the Respondent faulted the administration process because the Petitioner disregarded the unsecured creditors' rights. It highlighted that its notice to produce was not responded to nor was an explanation for the non-response given. It also highlighted that the Petitioner did not dispute that the creditors were not properly engaged.
21. Citing *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* (Insolvency Petition E004 of 2021) [2021] KEHC 242 (KLR) (Commercial and Tax) (19 November 2021) (Ruling), the Respondent asserted that the Petitioner owes a duty to not only to the appointing agent but also to the whole body of creditors and ought to be transparent and accountable in carrying out its duties.
22. The Respondent submitted that the Petition has been filed in bad faith to avoid the Creditors' claims. It claimed that the Petitioner colluded with the Company's directors and shareholders to avoid the creditors' claims, considering that it was them that appointed the Petitioner as the Company's administrator while all the Company's. With this being the case, the shareholders stand to lose nothing.
23. I have noted the complaints made by the Respondent in this matter. The Petitioner was appointed as the Company's Administrator through a Notice of Appointment of Administrator dated 6th May



2022 by the Directors. The Petitioner has explained its actions during the administration. It published a notice of appointment and placement of the company under Administration on 10th May 2022 through a Gazette Notice which also asked the Company's creditors to file their claims (which included their contact information) per the Act. This served to notify the Company's creditors of their appointment and for their participation.

24. The Petitioner produced a copy of its interim report and proposal dated 4th July 2022 which indicated that upon examination of the company's Statement of Affairs as at the date of Administration submitted to the Administrator by officers of the Company, the company's assets had a book value of Kshs. 453,283,011/= (subject to valuation of current value) while its total liabilities stood at about Kshs. 697,466,922.35/=. It also indicated that a realization of Kshs. 91,665,770/= was made at the lapse of the administration proceedings, from the known assets of the company.
25. The Respondent claimed that the Petitioner did not call a creditors meeting as required under Section 568 of the *Insolvency Act*; or send the creditors a statement of proposal as required under Section 566 (4) (a) of the *Insolvency Act*. However, the Petitioner stated that guided by Section 575 of the Act, it shared the proposal with the creditors within its database through correspondence due to the large number of creditors.
26. Section 566 of the Act provides that:-

“566. Administrator to make statement setting out administrator's proposals for achieving the purpose of the administration

- (1) The administrator of a company shall make a statement setting out proposals for achieving the purpose of administration.
- (2) The administrator shall ensure that the proposals —
 - (a) deal with such matters as may be prescribed by the insolvency regulations for the purposes of this section; and
 - (b) if applicable, explain why the administrator believes that the objective specified in section 522(1)(a) or (b) cannot be achieved.
- (3) Proposals under this section may include—
 - (a) a proposal for a voluntary arrangement under Part IX; or
 - (b) a proposal for a compromise or arrangement to be sanctioned under the *Companies Act*, 2015.
- (4) The administrator—
 - (a) shall send a copy of the statement of the administrator's proposals —
 - (i) to every creditor of the company of whose claim and address the administrator is aware; and



- (ii) to every member of the company of whose address the administrator is aware; and
- (b) shall lodge a copy of the statement with the Registrar for registration.
- (5) The administrator shall comply with subsection (4) —
 - (a) as soon as is reasonably practicable after the company enters administration; and
 - (b) in any case, not later than sixty days after the date on which the company enters administration,
- (6) Subsection (4)(a)(ii) is complied with if the administrator publishes in accordance with the insolvency regulations a notice undertaking to provide a copy of the statement of proposals free of charge to any member of the company who applies in writing to a specified address.
- (7) An administrator who fails, without reasonable excuse, to comply with subsection (5) commits an offence and on conviction is liable to a fine not exceeding five hundred thousand shillings.”

27. Section 568 of the *Insolvency Act* provides that:-

“ 568. Requirement to convene initial creditors' meeting

- (1) The administrator shall ensure that each copy of the administrator's statement of proposals sent to a creditor in accordance with section 566(4)(b) is accompanied by an invitation to an initial creditors' meeting to be held—
 - (a) as soon as is reasonably practicable after the company enters administration; and
 - (b) in any case, within seventy days from and including the date on which the company enters administration.
- (2) The administrator shall present a copy to the administrator's statement of proposals to the initial creditors' meeting.
- (3) The period specified in subsection (1)(b) can be varied in accordance with section 622.



28. Section 575 of the Act provides that: -

“ 575. Creditors' meeting can be conducted by correspondence

- (1) Any matter or decision that is required or permitted by or under this Part to be dealt with or made at a creditors' meeting may be dealt with or made by correspondence between the administrator and creditors—
 - (a) as provided by the insolvency regulations; and
 - (b) subject to any condition specified in those regulations for the purposes of this section.
- (2) A reference in this Part to anything done at a creditors' meeting includes anything done in the course of correspondence in reliance on subsection (1).
- (3) A requirement to hold a creditors' meeting is satisfied by conducting correspondence in accordance with this section.”

29. From the above, I find that the Petitioner complied as a creditors' meeting is satisfied by conducting correspondence in accordance with this section. Therefore, the Respondent's contentions fail.

30. The Respondent again faulted the Petitioner for failure to provide details regarding the Kshs. 80,500,000/- recovered from the sale of the company's assets, which was allegedly used to offset a loan from SBM Bank and for failing to explain why it did not seek to proceed under Section 588 of the *Insolvency Act* which empowers it to dispose of and deal with the charged property; non-floating charge.

31. Section 588 of the *Insolvency Act* provides that:-

“ 588. Power of administrator to dispose of, and deal with, charged property: non-floating charge

- (1) On the application of the administrator of a company, the Court may make an order enabling the administrator to dispose of property that is subject to a security as if it were not subject to the security.
- (2) An order under subsection (1) may be made if the Court believes that disposal of the property would be likely to promote the purpose of the administration of the company.
- (3) An order under this section is subject to the condition that—
 - (a) the net proceeds of disposal of the property; and
 - (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the Court as the net amount that would be realised on a sale of the property at market value, will be applied towards discharging the amounts secured by the security.



- (4) If an order under this section relates to more than one security, the administrator shall apply the net proceeds of disposal in the order of the priorities of the securities.
- (5) Within fourteen days after the date on which an order is made under this section, the administrator shall lodge a copy of the order with the Registrar for registration.
- (6) An administrator who, without reasonable excuse, fails to comply with subsection (5) commits an offence and on conviction is liable to a fine not exceeding two hundred shillings.
- (7) If, after being convicted of an offence under subsection (6), the administrator continues to fail to lodge the required order with the Registrar, the administrator commits a further offence on each day on which the failure continues and on conviction is liable to a fine not exceeding twenty thousand shillings for each such offence.”

32. According to the Petitioner, at the time of appointment as administrator, the company’s assets were also subject to various debentures and charges created by the company in favour of secured creditors i.e. Stitching DOB Equity and SBM Bank. The Petitioner explained that the assets were out of its reach since the secured creditors had indicated that they intended to elect to invoke their rights to realize their property on their own terms.
33. In *Kimeto & Associates Advocates v KCB Bank Kenya Limited & 2 others* (Insolvency Petition E004 of 2021) [2021] KEHC 242 (KLR) (Commercial and Tax) (19 November 2021) (Ruling), the Court noted at para. 123 that deference had to be given to the secured creditors whose rights include freedom to realize their securities without unnecessary interference.
34. The Respondent claimed that the Petitioner colluded with the Company’s directors and shareholders to avoid the creditors’ claims, considering that it was them that appointed the Petitioner as the Company’s administrator while all the Company’s. The Petitioner indicated that SBM Bank was the only secured creditor that had so far fully recovered its Kshs. 80,500,000/- debt from the sale of the Company’s assets. I note that SBM Bank is not listed as a shareholder of the Company. There was no evidence produced by the Respondent to show that it was a shareholder.
35. I note from the Petitioner’s Report and Proposal that Stitching DOB Equity, is both a shareholder and also a secured creditor. The Petitioner indicated that Stitching DOB Equity is yet to enforce its secured debt but has issued Statutory Demands.
36. Accordingly, I find that there is no evidence produced by the Respondent of collusion between the shareholders and the Petitioner. Importantly, collusion, which is a form of fraud and requires a standard of proof higher than a balance of probabilities.
37. On the whole, therefore, I find that the Administration process was carried out per the *Insolvency Act, 2015*.

Whether the liquidation petition is merited

38. The next issue is whether the liquidation petition is merited. This



Liquidation Petition is made under Section 425(1)(d) of the [Insolvency Act](#), which reads as follows:-

“ 425. Applications to the Court for liquidation of companies

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

...

(d) a provisional liquidator or an administrator of the company;...”

39. The basis for the Petition is that the company is unable to pay its debts. Section 384 of the [Insolvency Act](#) sets out the circumstances which a company is unable to pay its debts, as follows:-

“ 384.

(1) For 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).”

40. The Respondent submitted that the Petitioner has not met the threshold for the grant of a liquidation order. It also submitted the Petitioner has not produced evidence of the Company’s insolvency such as the financial documents requested by it in its notice to produce. It asserted that there must be evidence supporting the Petitioner’s opinion of the Company’s inability to pay its debts.
41. The Respondent contended that the Petitioner failed to produce evidence of the Company’s insolvency such as the financial documents requested by it in its notice to produce.
42. However, I note from the record that the Respondent’s notice to produce was sent on 11th September 2023, way after the administrator’s term lapsed on 5th May 2023. I also note that the Petitioner produced an affidavit of statement of facts sworn by the Company’s shareholder and director, Saskia Van Der Mast on 6th May 2022, marked as DM2(a). I further note that annexed to that affidavit and marked as “CD2” was a copy of the Company’s statement of financial position. The statement of affairs produced and marked as DM2(b).
43. The annexures confirm that the Company’s liabilities exceed its assets and that therefore, the Company is unable to pay its debts.



44. On the other hand, the Respondent has not furnished evidence that the Petition has been brought in bad faith in order to evade lawful debts. The Respondent has also not shown that there are special circumstances to warrant the postponement of the liquidation.

45. In *Re Tusker Mattresses Limited* (Insolvency Cause E018 of 2020) [2021] KEHC 276 (KLR) (Commercial and Tax) (26 November 2021) (Ruling), cited by the Petitioner, it was observed as follows:-

“But as is clear from the language of section 3(1) (c) of the *Insolvency Act*, the power to adjourn is only exercisable when the financial position of the insolvency company is redeemable. It is not an order to be made merely to postpone the day of reckoning. The onus is on the party applying, in this event the company, to establish that its financial position is redeemable and revival be given a chance.”

46. In *Kenya Artisans Limited v Chemical & Allied Workers Union* [2021] eKLR the Court held that:-

“31. 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*.^[7] 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.

32. 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.

33. 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.

34. Section 427 of the Act 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, but the court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets. The discretion that the court enjoys in this regard is not unlimited. It has to be excised judiciously. By way of



analogy, the procedure for liquidation is regulated by the provisions of the Act. Section 427 vests a court with power to liquidate a company. This authority is discretionary. As Caney J said in *Rosenbach & Co (Pty) Ltd v Singh's Bazaar (Pty) Ltd*;[8]

“The Court has a discretion to refuse a winding-up order ...but it is one which is limited where a creditor has a debt which the company cannot pay; in such a case the creditor is entitled, *ex debito justitiae*, to a winding-up order.”

35. The court must thus have regard to a number of diverse and contrasting factors before reaching an ultimate conclusion. Even though the list of considerations is not exhaustive, the court is required to consider the effect of the order on the debtor, secured creditors and other debtor's creditors. The court must balance these conflicting interests.”

47. Flowing from the above, I find that the liquidation petition is merited.

48. Under Section 441 (1) of the *Insolvency Act*, this Honourable Court has the power to appoint as Liquidator of the company the person whose appointment as Administrator has ceased to have effect.

Final Disposition

49. In conclusion, I make the following orders: -

- a. That a Liquidation Order be and is hereby issued in respect of Countryside Dairy Limited.
- b. That the Official Liquidator be and is hereby appointed as the liquidator of Countryside Dairy Limited.
- c. That the costs of these proceedings shall be costs in the liquidation of the company.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

J. W. W. MONGARE

JUDGE

In The Presence of:-

Ms. Diana Mumo for the Official Receiver.

Ms. Mithi for Family Bank-A creditor.

Ms. Mburu holding brief for Mr. Mutei for Airflow Engineering Limited, a Creditor.

Ms. Kendi for Even Business Park, a Creditor.

Ms. Sheila Egesa for Azari Certified Public Secretaries LLP, a Creditor.

Mr. Paul Kamara for Social Alpha and Open Road Alliance – Creditors.

Amos - Court Assistant

