



**Matogo v Booth Extrusions Limited (In Receivership) (Insolvency Petition E041 of 2021)
[2024] KEHC 16101 (KLR) (Commercial and Tax) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E041 OF 2021
MN MWANGI, J
DECEMBER 13, 2024
IN THE MATTER OF BOOTH EXTRUSIONS LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015, LAWS OF KENYA
AND
IN THE MATTER OF SECTIONS 424, 425, 427 & 432 OF
THE INSOLVENCY ACT, NO. 17 OF 2015, LAWS OF KENYA
AND
IN THE MATTER OF REGULATION 77B OF THE INSOLVENCY REGULATIONS, 2016
BETWEEN
JEREMIAH ONDIEKI MATOGO CREDITOR
AND
BOOTH EXTRUSIONS LIMITED (IN RECEIVERSHIP) DEBTOR**

JUDGMENT

1. The creditor filed the instant insolvency petition against the debtor vide a petition dated 16th April 2021 praying for this Court to issue an order liquidating the debtor company. The petition is premised on the grounds on the face of it, and it is supported by a verifying sworn on the same day by Jeremiah Ondieki Matogo, the creditor herein.
2. The creditor's case is that on or about 31st May 2017, he entered into an Investment Contract with Booth Extrusions Limited (the debtor) through its agent Investment House Limited, for the purchase of a Short-Term Note. That thereafter, he made an initial purchase of Kshs.3,250,000/= on 30th June



2017. He averred that over time, he topped up the investment and received confirmations of Short-Term Note rollover and purchase from the debtor's agent. It was stated by the creditor that despite the fact that the Short-Term Note was redeemable at his option, the debtor only made to him two partial payments of the investment sum being Kshs.168,963.54 on 2nd December 2019 and Kshs.150,000/= on 29th May 2020, but failed to pay the principal amount of Kshs.15,464,570.85 upon its maturity on 2nd December 2020, despite him having made a demand for immediate payment of the same.

3. The creditor asserted that despite various communications between the parties herein, and a meeting held on 2nd November 2020 between the said parties, together with the debtor's agent, there have been no efforts by the debtor to settle its debt with him. The creditor averred that a demand for payment of the sum of Kshs.15,464,570.85 was made on 4th December 2020, but the same was not honoured by the debtor, and the debtor was issued with a statutory demand on 8th December 2020 for payment of the aforesaid debt, which the debtor again failed to honour and/or comply with. The creditor stated that there is no application filed by the debtor to set aside the aforesaid statutory demand that is pending before this Court. He asserted that he had demonstrated that the debtor is indeed indebted to him, and it is unable to pay its debt. He urged this Court to issue a liquidation order against the debtor.
4. On perusal of the Court record and the Case Tracking System, this Court notes that the debtor did not file any pleadings in opposition to the instant petition, which was canvassed by way of written submissions. Whereas the creditor's submissions were filed on 29th September 2023 by the law firm of Mohammed Muigai LLP, there is however no evidence of filing of submissions by the debtor in the Court file and on the Case Tracking System (CTS).
5. Ms. Kaunda, learned Counsel for the creditor submitted that having complied with the provisions of Section 38(1)(a) of the *Insolvency Act*, 2015, and having demonstrated that despite service of a statutory demand upon the debtor, it has still failed to pay the debt owed to the creditor within the twenty one (21) days stipulated in the statutory demand, this Court should issue an order liquidating the debtor company. To buttress these submissions, Counsel relied on the provisions of Section 424 of the *Insolvency Act*, 2015, the Court of Appeal case of *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR, and the case of *Re Nakumatt Holdings Ltd* [2017] eKLR.

Analysis and Determination.

6. I have considered the instant petition, the affidavit filed in support thereof, and the written submissions by Counsel for the creditor. The issue that arises for determination is whether this Court should issue an order liquidating the debtor company.
7. The instances under which a company may be liquidated by a Court are provided for under Section 424(1) of the *Insolvency Act*, 2015 which provides that –

“ 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* (Cap. 486); 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 reduced 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.”

8. In urging this Court to liquidate the debtor company, the creditor relied on the provisions of Section 424(1)(e) of the *Insolvency Act*. Section 384 of the *Insolvency Act*, 2015 outlines the circumstances under which a company may be deemed to be unable to pay its debts as hereunder –

- 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).

9. The creditor’s case is that he entered into an Investment Agreement with the debtor on 31st May 2017 for the purchase of a Short-Term Note, and made an initial purchase of Kshs. 3,250,000/= on 30th June 2017. He averred that over time, he topped up the investment and received confirmations of Short-Term Note rollover and purchase from the debtor’s agent. On perusal of the documents annexed to the creditor’s petition, this Court notes that the creditor provided several Swift Out Reports showing movement of money from his account to the debtor’s account, cheque pay in slips confirming several cheque deposits of different amounts into the debtors account, several confirmation of short-term note-purchase, and confirmation of short-term note-rollover and purchase issued to the creditor by the debtor’s agent, in support of the aforesaid allegations.

10. It was stated by the creditor that despite the fact that the short-term note was redeemable at his option, the debtor only made to him two partial payments of the investment sum being Kshs.168,963.54 on 2nd December 2019 and Kshs.150,000/= on 29th May 2020, but failed to pay the principal amount of Kshs.15,464,570.85 upon its maturity on 2nd December 2020. On further perusal of the last



confirmation of the short-term note-rollover issued to the creditor by the debtor's agent dated 2nd December 2020, it is evident that the said agent who had all along been dealing on behalf of the debtor indicated that the purchase price was Kshs.15,464,570.85, which was set to mature on 3rd March 2021. The creditor however averred that he declined further rollover as indicated on the said confirmation of short-term note-rollover and demanded immediate payment of the sum of Kshs.15,464,570.85 vide a letter dated 4th December 2020 annexed to the instant petition.

11. The creditor claimed that the said demand letter elicited no response from the debtor, thus he instructed his Advocates on record to issue the debtor with a statutory demand, which they did on 8th December 2020. Upon perusal of the statutory demand, the said demand required the debtor to pay the creditor the sum of Kshs.15,464,570.85 within twenty one (21) days after issuance of the said demand. It is however worthy of note that despite receipt of the said statutory demand, the debtor neither complied with the said demand nor sought to set it aside. It is not in contest that as at the time of writing this judgment, there is no pending application to set aside the aforesaid statutory demand either before this Court or any other Court of competent jurisdiction to do so. In the premise, this Court finds that the debt herein has not been properly disputed, thus the creditor was at liberty to institute the instant petition against the debtor, upon the elapse of twenty one (21) days from the date of issuance of the statutory demand dated 7th December 2020.
12. As stated earlier on in this judgement, the debtor did not file any pleadings in opposition to the instant petition, hence the hearing of the petition proceeded unopposed. In the oft-cited Court of Appeal case of *Pride Inn Hotels and Investments Limited v Tropicana Hotels Limited* (*supra*), Visram JA., reading the majority judgment of the Court, had this to say -

This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act*, which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.
13. The debt in this petition has been due and owing to the creditor from the debtor since 4th December 2020 when the creditor issued the debtor with a demand for payment of its investment. The debtor was served with a statutory demand dated 7th December 2020, but to date it has not made good the said demand. It has also not demonstrated that it paid and/or attempted to pay the undisputed amount and or submitted a payment plan proposal for consideration by the creditor and the Court, so as to show this Court its willingness and/or ability to pay the debt in issue.
14. In the premise, I am persuaded that the creditor has sufficiently demonstrated that the debtor company is unable to pay its debts. In view of the said finding, and the fact that the debtor's receivership ended on 5th February 2024 as indicated by Mr. Ondati, learned Counsel who held brief for the debtor's Receiver Manager on 17th April 2024, I do not find any compelling reason not issue an order liquidating the debtor company.
15. In the end, this Court finds that the instant petition is merited. It is hereby allowed in the following terms -



- i. Booth Extrusions Limited (In Receivership) is hereby declared insolvent and liquidated under the provisions of the *Insolvency Act*;
- ii. The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed as the Liquidator of the debtor's properties; and
- iii. Costs of the petition shall be borne out of the debtor's assets.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF DECEMBER 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mbodze h/b for Ms Kaunda for the petitioner

Mr. Javer for Amadip for the creditor

No appearance for the debtor

Ms B. Wokabi - Court Assistant.

