



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

INSOLVENCY PETITION NO. 7 OF 2016

IN THE MATTER OF SPENCON KENYA LIMITED

AND

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

MUNIU THOITHI.....PETITIONER/APPLICANT

J U D G M E N T

1. By an insolvency petition dated 7/11/2018, brought under *section 424(1)(e) and 425(1)(d) of the Insolvency Act*, the Petitioner sought that **Spenco Kenya Limited** (hereinafter ‘the Company’) be liquidated.
2. The petitioner is **MUNIU THOITHI**, one of the Court appointed provisional liquidators, who sought that the Company be liquidated by the Court for being unable to pay its debts. He further sought that he together with **KURIA MUCHIRU** be appointed joint liquidators.
3. The grounds for the petition include that; the Company had been in administration in **Insolvency Cause No. 7 of 2016** since 2016. The said administration ended on 29/11/2018 without payment of any of the creditors including the secured ones. That these circumstances made it necessary for the Company’s affairs to be wound up through liquidation by the court.
4. Further, he contended that in the Joint Administrators’ Report and Statement of Proposals approved by the Company’s creditors, it was notified that at the end of the Administration, the Administrators would seek to be appointed as Joint Liquidators and that any act required or authorized to be done by the Joint Liquidators, be done by either one or all of them.
5. I have considered the entire record and the petition. The record shows that, on 20/11/2018, the Court gave an Order appointing the petitioner and **KURIA MUCHIRU** as provisional liquidators under *section 437 (3) of the Insolvency Act*. The order was made pending the hearing and determination of this liquidation petition. Prior to this, the Company had been under administration of both the petitioner and **KURIA MUCHIRU**.
6. On 9/11/2020, the Court directed the petitioner to advertise the hearing of this petition to liquidate the Company in the Daily Nation as a means of service to the Company’s creditors. The petitioner complied with the said direction and placed an advert in the Daily Nation of 2/12/2020.
7. On 7/12/2020, the date set for the hearing, the Petitioner’s Counsel appeared virtually before Court while there was no appearance by either a supporting creditor or debtor. Counsel for the petitioner urged that the petition be allowed for being unopposed.
8. *Section 424(1) of the Insolvency Act*, provides that the Court may liquidate a company if it is unable to pay its debts. On the other hand, *Section 425(1)(d) of the same Act* provides that a provisional liquidator or administrator may apply to the Court for the liquidation of the Company.
9. *Section 427(1) of the Act* provides: -

“(1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:

(a) an order dismissing the application;

(b) an order adjourning the hearing, conditionally or unconditionally;

(c) *an interim liquidation order; or*

(d) *any other order that, in its opinion, the circumstances of the case require”.*

10. From the foregoing, it is clear that the Court has jurisdiction to order the liquidation of a company where the company is unable to pay its debts. Such an application may be made by a provisional liquidator. Both of these conditions have been met in the present petition.

11. In **re Ukwala Supermarket Limited [2019] eKLR** the Court stated: -

“In any Petition brought for the purposes of liquidating a Company, the Court has the discretion once the Petitioner has established the right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.”

12. The petitioner showed that the Company had been under Administration but was still unable to pay its creditors, even the secured ones. The Joint Administrators’ progress report for the period 22/08/2017 to 22/05/2018 at page 8 state that the company had an ‘*apparent lack of adequate funds to make a distribution to creditors after deducting administration costs*’. There was nothing on record to show the contrary. In this regard, the Court is satisfied that the company was indeed unable to pay its debts.

13. In **Re Ukwala Supermarket Limited (supra)**, the Court stated: -

“to grant an order for liquidation, the Court must be satisfied that the creditors are aware of the Petition and are given sufficient time to respond. The Court must thus have regard to a number of diverse and contrasting factors before reaching an ultimate conclusion. Without limitation, the following factors to be considered in the exercise of discretion whether or not to make a liquidation order include; (i) the effect of an order under Section 425 would have on the rights of secured and unsecured creditors as balanced with that of the Company, (ii) the insolvency level of the Company both commercially and under the balance sheet”.

14. In this regard, a liquidation order would likely have a better effect on both the creditors as they have been unable to receive any payment under the administration process and the Company which has insufficient resources.

15. Owing to the fact that the Court had earlier appointed the Petitioner herein and **KURIA MUCHIRU** as provisional liquidators, it is justifiable to appoint them as liquidators going forward.

16. For the above reasons the Court is satisfied that the petition is well merited and allows the same as follows: -

a) **Spenco Kenya Limited** be liquidated by the Court under the provisions of *sections 424 (1) and 425 (1) (d) of the Insolvency Act No.18 of 2015*.

b) **MUNI THOITHI** and **KURIA MUCHIRU** are hereby appointed as Joint Liquidators for purposes of winding up the Company.

c) The costs of this petition be paid out of the assets of the Company.

It is so decreed.

DATED and **DELIVERED** at Nairobi this 4th day of March, 2021.

A. MABEYA, FCI Arb

JUDGE