



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
INSOLVENCY PETITION NO. E 031 OF 2020
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
IN THE MATTER OF VOLUNTARY WINDING UP PETITION OF KENYA ARTISANS LIMITED

KENYA ARTISANS LIMITED.....PETITIONER

VERSUS

CHEMICAL & ALLIED WORKERS UNION.....RESPONDENT

JUDGMENT

The Petition

1. Vide a Petition dated 24th August 2020, Kenya Artisans Limited (the Petitioner), a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies Act^[1] (now repealed) and having its registered offices at Nakuru in the Republic of Kenya petitioned this court for a liquidation order. The Petition is expressed under section 425 (1) (a) of the Insolvency Act^[2] (herein after referred to as the Act).
2. The Petitioner states that it was incorporated on the 5th April 2012 under the provisions of the Companies Act (Repealed), with a nominal capital of **Kshs.100,000.00** divided into **1,000** Ordinary Shares of **Kshs.100.00** each. It states that the capital paid up or credited as paid up is **Kshs.100,000.00**. It states that the principal business for which it was established was making, processing, preparing, sizing, colouring, designing, finishing working or manufacturing in any way whatever, handicrafts of all kinds using all kinds of materials including without limitation grass, gemstones, precious metals, clay wood, plastic, enamel, semi-precious stones, coral and other natural or synthetic materials and to make, buy and sell or otherwise deal with such handicrafts and to carry on any other trade or business in connection with the aforementioned.
3. It states that at the time of incorporating the company, it had two directors, namely Penelope Maru Shaw and Ian Gerald Shah, but vide an ordinary resolution passed on 30th July 2019, Mr. Ian Gerald Shah resigned, leaving Penelope Mary Shaw as the sole director. It states that after its incorporation, the company commenced business and its financial position was sound, but its business deteriorated due to a number of factors including theft of its funds and the challenges attributed to the COVID-19 pandemic hence its inability to pay its debts.
4. The Petitioner states that as per its statement of accounts, it has **Kshs. 3,675,696/=** worth of assets and liabilities to the tune of **Kshs. 15,180,796/=** as at 23rd July, 2020 being essentially amounts its indebted to its employees through Chemical & Allied Workers Union (the Respondent) and remains so indebted in respect of salaries, gratuities and other payables. It states that it is not in a position to pay its debts and that the debt owed to the its employees is within the prescribed insolvency level in accordance with the Act. It states that it is deemed to be unable or has no reasonable prospects to pay its debts to its creditors and in a special meeting held on 24th August, 2020, the Directors resolved to wind up the Company.
5. Consequently, the Petitioner prays that the court makes an order for its liquidation, that the Official Liquidator be appointed to take over its management and that the court makes such orders as may be necessary and just in the premises.

The Respondent's Response

6. The Respondent, Kenya Chemical Workers Union, a trade Union and Labour Organization representing the interests of the Petitioner's workers aver that the Petition is a clever scheme to deny the company's employees their benefits stipulated in a Collective Bargaining

Agreement. It states that it was collecting dues from the company for 37 employees and that the Company is now operating under the name Pyrethrum Processing Company of Kenya Ltd. It also states that tabulations for the 15 affected employees aggregate to **Kshs. 17,061,849/=**. Additionally, it states that the two shareholders/directors of the company are husband and wife. Lastly, the Respondent prays that the company be compelled to pay the employees **Kshs. 17,061,849/=**; that the company be ordered or directed to deposit the said amount in this court and the company pays the costs of this Petition.

The Petitioner's further affidavit

7. The Petitioner filed the further affidavit of Penelope Mary Shaw. The nub of the affidavit is that the Petitioner's directors bought KAPI whose core business was the manufacture of insecticides, but, a small workshop existed within the business of KAPI known as *KraftyArtz Handicraft Business* set up by the previous owner which Penelope Mary Shaw operated as a distinct business from that of KAPI and in 2012, they separated *KraftyArtz Handicraft Business* workshop from KAPI by incorporating Kenya Artisans Limited.

8. The Petitioner averred that at the time of incorporating the Petitioner, the law required a minimum 2 directors and between 2008 and 2012 the company's employees were employed by KAPI. Further, that the Respondent did not distinguish the artisans from the other employees who were working directly in the insecticide plant. Further, in 2012, the Petitioner and KAPI entered into an agreement whereby, the Petitioner would assume all the assets and liabilities of *KraftyArtz Handicraft Business* including the gratuities and salaries of the employees.

9. The Petitioner also averred that the company entered into a Lease Agreement with KAPI for Blocks 6/112 and 6/113 located on Harvester Road, Nakuru and continuously paid rent to KAPI until the termination of the lease and that the companies were distinct and separate entities. It is the Petitioner's position that vide a letter dated 15th May 2012, the Petitioner formally invited the Respondent to a meeting to discuss separation of the Handicraft Division of KAPI to form Kenya Artisans Limited, but Respondent failed to attend the meeting even after subsequent reminders. However, the Petitioner in good faith continued to respect the CBA and it paid dues to the Respondent on behalf of the employees.

10. The Petitioner also states that vide a letter dated 17th December 2018, KAPI informed the Respondent of the need to negotiate the CBA separately for the two companies as opposed to the combined CBA, and in July 2019, owing to a change in Company law, allowing for sole directorship the directors of the Petitioner and KAPI separated the companies. Additionally, the Petitioner states that vide a letter dated 16th September 2019, it wrote to the Respondent confirming that the Petitioner and KAPI had separated and an independent CBA needed to be negotiated, and in response the Respondent sought clarification on the relationship between the Petitioner and KAPI, which was provided. Further, that the Respondent admitted vide its letter dated 27th November 2019 that the Petitioner and KAPI are separate and went further to enclose a Recognition Agreement to that effect, but in response, the Petitioner indicated that the Respondent is not the correct union and therefore cannot represent the Petitioner's employees.

11. Accordingly, the Petitioner states that the Respondent lacks the capacity to represent the Petitioner's employees, but despite this position, the Petitioner in good faith continued paying the employees dues to the Union, whilst seeking a resolution. Further, that in June and July 2020, the Petitioner approached the Respondent with a view to resume operations with skeleton staff but the Respondent was adamant that the Petitioner would have to cater for its all employees, but the Petitioner was unable to comply, hence, it had no alternative but to file this Petition owing to its inability to pay salaries and accrued gratuities. Further, that there is no Recognition Agreement and/or CBA between the Petitioner and the Respondent, and it is untrue that the Petitioner is hiding behind KAPI.

12. The Petitioner also states that there is no relation between the two companies and that the reason for filing this Petition, and that the Petitioner enjoyed sound financial position until the COVID-19 pandemic in March 2020 which affected its clientele. Lastly, that the sum of **Kshs 17,061,849/=** is grossly exaggerated and the amount owed stands at **Kshs. 6,579,675/=** as per the computation of gratuity.

The Petitioner's advocates submissions

13. The Petitioner's counsel submitted that Part VI of the Act provides for liquidation of companies and Section 423 of the Act gives the High Court the jurisdiction to supervise the liquidation of companies' subject to certain conditions that need to be met by the Company. He submitted 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) ...

c) ...

d) the company is unable to pay its debts;

e) ...

f) the court is of the opinion that it is just and equitable that the company should be liquidated.

14. Counsel submitted that the Petitioner has met two of the criteria set out above; in that it has passed a Special Resolution resolving that the company be liquidated by the court and it is unable to pay its debts. Counsel pointed out that the Special Resolution was passed on 24th August 2020. Further, counsel submitted that the Petition was accompanied by a Statement of Financial Position for the year ended 31st May 2020. Counsel submitted that it approached this Court under section 425 of the Act to be liquidated by the Court.

15. Counsel submitted that the Petition has been brought by the sole Director of the Company, Penelope Mary Shaw and as such it meets the above criteria, and that the Petitioner's liabilities far exceed its assets. He relied on *re Iflix (Kenya) Limited*^[3] which held that where the evidence of indebtedness is uncontroverted, then a Petitioner will have established grounds for its liquidation and an order of liquidation pursuant to section 427(1)(c) of the Act will issue. Counsel submitted that the Petitioner's evidence of indebtedness remains unchallenged.

16. The Petitioner's counsel cited *Ukwala Supermarket (Eldoret) Limited*^[4] which allowed a Petition on grounds that the Petitioner had established inability to pay its debts and that its liabilities exceeded the available assets as required by section 384(2) of the Act. To further buttress his argument, counsel cited section 384 of the Act which provides the circumstances under which 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.

1) 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).

2) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).

17. Additionally, counsel submitted that the Statement of Financial Position that has been adduced alongside the Petition, clearly shows that the Petitioner's liabilities far exceed its assets and as a result of is not commercially viable and that the best it can do is sell off its current assets and distribute the proceeds thereof to its employees. He submitted that the Petitioner is unable to settle its debts and that it has met the statutory threshold to warrant liquidation by this court. He relied on *in The Matter of Printing Impressions Limited*^[5] in which the court held that where a Petitioner satisfies the court that it is unable to pay its debts, it is insolvent and there is no reason not to grant a liquidation order. He argued that the statement produced in court demonstrate that its liabilities exceed its assets. Additionally, counsel submitted that the Petitioner is a distinct legal entity from KIFI (citing *Mohamed Adan Molly v Linksoft (K) Ltd & another {2013} e KLR*).

The Respondent's submissions

18. The Respondent submitted that they never received any document from the Petitioner asking for separation of the two companies i.e. Kapi Limited/ Kenya Artisans Limited, and, that it is not true that the Petitioner was affected by the COVID19 Pandemic. It argued that the Petitioner has bought another land and secured premises for business behind Pyrethrum Board of Kenya in Nakuru County that it is negotiating at the Federation of Kenya Employers in Nakuru for a new CBA for Kapi Ltd employees. It argued that the Petitioner seeks to find a way of running away with employees benefits who had worked for the company for many years to deny them their benefits.

Determination

19. A useful starting point is to mention that the Preamble to the Act gives an insight of the purpose of the Act. It reads- "An Act of Parliament to amend and consolidate the law relating to the insolvency of natural persons and incorporated and unincorporated bodies; to provide for and to regulate the bankruptcy of natural persons; to provide alternative procedures to bankruptcy that will enable the affairs of insolvent natural persons to be managed for the benefit of their creditors; to provide for the liquidation of incorporated and unincorporated bodies (including ones that may be solvent); to provide as an alternative to liquidation procedures that will enable the affairs of such of those bodies as become insolvent to be administered for the benefit of their creditors; and to provide for related and incidental matters."

20. The Preamble shows that insolvency law provides a much-needed orderly process for the reorganization or liquidation of insolvent entities. It provides comfort in the form of a safety net for business activity by offering mechanisms for rescue or value, maximizing exit from the business and to timely distinguish between those firms that can be saved and those that must exit fast. The Preamble leaves no doubt that the insolvency law should inhibit premature liquidation of sustainable businesses.

21. The predominant objective of the Act is to see whether there are reasonable prospects for revival of the fortunes of the business and if it is not, put the business in liquidation mode and liquidate the assets in a time bound manner. These rationales clearly suggest that the existence of bankruptcy is tied up with an attempt to arrive at a balance, that is the law is seeking to ensure that there is a balance between the interests of those who, for the want of a better word, are 'stakeholders' in a person's insolvency. The stakeholders are the debtor, the debtor's creditors, and society in general, and bankruptcy involves these three parties in a compact. These stakeholders, together with the debtor's family which also can be seen as a stakeholder, have conflicting interests which produce tension, and it is the task of the law to reconcile these interests.^[6]

22. Section 424 of the Act provides the circumstances under which a company may be liquidated by the court. Relevant to the instant case is section 424 (1) (a), (e) & (g) 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; (e) the company is unable to pay its debts;(g) the Court is of the opinion that it is just and equitable that the company should be liquidated. Section 425 of the Act provides for persons eligible to apply to the Court for liquidation. These are the Company or its Directors, a creditor or creditors, a contributory or contributories of the Company and Provisional Liquidator or an Administrator of the Company and, if the company is in voluntary liquidation—the liquidator.

23. The procedure for liquidation by the court is provided for in Regulation **77B** of the *Insolvency Act (Amendment) Regulations 2018*. For purposes of Section **425** of the Act, an application for liquidation shall meet the procedural requirements of Regulation **77B (1)** of the 2018 Regulations as follows:- **77B. (1) (a)** by way of Petition in Form **33B1** set out in the First Schedule, (b) Accompanied by a verifying affidavit in Form **33B2** set out in the First Schedule; and (2) The Petition for liquidation shall be accompanied by the following documents— (a) A statutory demand if the reason for Petition is indebtedness; and (b) A statement of financial position in Form **32** set out in the First Schedule where necessary.

24. The grounds relied is that the company is unable to pay its debts and that the directors have passed a resolution for its winding upon. There are different ways by which inability to pay debts may be established. It is useful to view them as falling broadly into two categories. The first category consists of general criteria of inability to pay debts, which may be proven by reference to the cash flow (or commercial) insolvency test or the balance sheet test. The second group consists of two very specific and readily ascertainable facts deemed to establish inability to pay debts – i.e. when a statutory demand for debts is not met or when an execution is returned unsatisfied.

25. Under the cash flow test, a company is insolvent when it is unable to pay its debts as they fall due. For this purpose, the fact that its assets exceed its liabilities is irrelevant; if it cannot pay its debts in the conduct of its business it is insolvent, for there is no reason why creditors should be expected to wait while the company realizes assets, some of which may not be held in readily liquidated form. As for the balance sheet test, the underlying idea is that it is not sufficient for the company to be able to meet its current obligations if its total liabilities cannot ultimately be met by the realization of its assets. Hence for this test contingent and prospective liabilities of the company will be taken into account in determining whether the company is balance sheet solvent.

26. The Act defines when a company may be said to be unable to pay its debts as:- if a company is unable to pay a debt of more than Kshs. 100,000 (approx. USD 1,000) within 21 days after being served with a statutory demand; If execution 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; If it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; 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).

27. Section 393 of the Act provides the circumstances under which a company may be liquidated voluntarily. It provides that-

(1) A company may be liquidated voluntarily— (a) when the period (if any) fixed for the duration of the company by the articles expires, or the event (if any) occurs, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting has passed a resolution providing for its voluntary liquidation; or (b) if the company resolves by special resolution that it be liquidated voluntarily.

28. A voluntary winding-up by members is initiated by a resolution passed by the members of the company. Such a resolution must state the reason for the winding-up. The power of the members to pass such a resolution cannot be excluded by the company's articles. Section **393 (4)** of the Act provides the required clarification as to the nature of the resolution contemplated under the above provision. It provides that the provisions of the Companies Act, 2015 which deal with resolutions affecting a company's constitution apply to a resolution under paragraph (a) of subsection (1) as well as a special resolution under paragraph (b) of that subsection.

29. Once the resolution has been passed, it must be published in accordance with Section **394** of the Act which provides that a Notice of the Resolution to liquidate be published within fourteen days after a company has passed a resolution for its voluntary liquidation, the notice setting out the resolution be published— (a) once in the Gazette; (b) once in at least two newspapers circulating in the area in which the company has its principal place of business in Kenya; and (c) on the company's website (if any).

30. Also relevant is section **395** of the Act which provides that the voluntary liquidation of a company commences when the resolution for voluntary liquidation is passed. Additionally, section **396** provides the consequences of resolution to liquidate as follows: - (1) On and after the commencement of voluntary liquidation of a company, the company shall cease to carry on its business, except in so far as may be necessary for its beneficial liquidation. (2) However, the corporate status and corporate powers of the company continue to have effect until the company is dissolved, even if the company's articles provide otherwise.

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 sequestered; 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. Applying the considerations discussed above to the facts of this case, it is my finding that the Petitioner has met the threshold for the court to grant the prayers sought. Accordingly, I allow the Petition and make the following orders: -

- a. ***That*** a Liquidation Order be and is hereby issued in respect of Kenya Artisans Limited.
- b. ***That*** the Official Liquidator be and is hereby appointed to take over management of Kenya Artisans Limited.
- c. ***That*** the costs of these proceedings shall be costs in the liquidation of the company.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 18TH DAY OF JUNE, 2021

John M. Mativo

Judge

[1] Cap 486, Laws of Kenya (Repealed).

[2] Act No. 18 of 2015.

[3] {2020} e KLR.

[4] {2020} e KLR.

[5] Insolvency Petition No. E003 of 2020

[6] Keay A “Balancing interests in bankruptcy law” (2001) Comm L World Rev 206 at 208.

[7] {2001} LLR 4837 (CAK).

[8] *Rosenbach & Co (Pty) Ltd v Singh’s Bazaar (Pty) Ltd* 1962 (4) SA 593 (D) at 597 E-F.