



In the Matter of the Liquidation of Cytonn Investments Management PLC (Insolvency Cause E021 of 2020) [2021] KEHC 156 (KLR) (Commercial and Tax) (14 October 2021) (Ruling)

Neutral citation: [2021] KEHC 156 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E021 OF 2020
F TUIYOTT, J
OCTOBER 14, 2021
IN THE MATTER OF THE INSOLVENCY ACT (NO. 18 OF 2015)
AND
IN THE MATTER OF THE COMPANIES ACT (NO. 17 OF 2015)
AND
IN THE MATTER OF THE LIQUIDATION OF
CYTONN INVESTMENTS MANAGEMENT PLC

RULING

1. For determination by this Court is the Notice of Motion dated 7th July 2020 for striking out of this Petition.
2. George Kirigi Thogo (the Petitioner) petitioned for winding up of Cytonn Investments Management PLC (Cytonn IM or the company). His case is that on diverse dates between 18th October 2019 and 7th February 2020 he entered into a Top-up/Further investment arrangement with the company under a scheme called High Yield Solution Scheme. He grieves that the company unilaterally adjusted the maturity dates of the investments and has not paid him the investment notwithstanding several demands. As at 30th June 2020, the total debt was Kshs.14,264,538/= with interest thereon.
3. The company asserts that the Petitioner invested in Cytonn High Yield Solution, LLP (CHYS) then known as Cytonn Cash Management Solution LLP (CCMS). Shown to Court is an investment agreement in which the Petitioner as a subscriber is said to be constituted as a partner in CCMS. The company's argument is simply that the Petitioner invested as a partner in CCMS which changed its name in 2018 to CHYS and that entity is a limited liability partnership and not a scheme of the company.
4. The Petitioner retorts by stating that the investment agreement is not the governing document. He points to an earlier agreement of 30th April 2018 between CCMS LLP and himself. The Petitioner



raises yet another issue. That on diverse dates between 18th October 2019 and 5th February 2020, he entered into 3 agreements between CHYS and the company which provided that CHYS was backed by a corporate guarantee of the company, described there as the main Cytonn group company and also the principal partner to CHYS.

5. The Petitioner avers that the company itself acknowledged receipt of funds and communicated to him regarding his investment. That, indeed, the company referred to the Cytonn High Yield Solutions as their product. That, in addition, the company resolved as principal partner to take responsibility and act in the best interest of CHYS and CPN funds.
6. In a further affidavit sworn on 2nd October 2020, he annexes a letter of 21st September 2020 in which the Capital Markets Authority states that CHYS is a product of Cytonn Investments Management Limited (the company herein).
7. The Court has given regard to the arguments made in support and against the plea for striking out.
8. A settled legal proposition is that liquidation of a company cannot be made when a debt is disputed (see amongst many decisions *Re Gengbis Capital Limited* [2019] eKLR). However, the dispute as to indebtedness has to be on a substantial ground. The ground must not be frivolous or without substance otherwise any Petition for liquidation could be successfully resisted by a company simply setting up an argument that the debt is disputed.
9. This Court is therefore obliged to test the grounds set up by the company to see whether they pass the threshold of bona fides and substantiality.
10. The evidence before this Court is that the investments made by the Petitioner, and which give rise to the alleged debt, are three similar Top-up/Further Investment Agreements. The Agreements have these 4 clauses:-
 1. This Investment Agreement is entered subject to the terms of the Cytonn High Yield Solutions LLP Partnership Agreement and as may be amended and restated from time to time.
 2. CYTONN HIGH YIELD SOLUTIONS LLP (the Partnership) is a limited liability partnership established pursuant to the provisions of the *Limited Liability Partnership Act*, Act 42 of 2011.
 3. Cytonn HYS Offering is offered exclusively to the Subscriber as a private offer as defined in Regulation 21 of the Capital Markets (Securities) (Public Offers, Listings, and Disclosures) Regulation 2002 and therefore not subject to approval by the Capital Markets Authority.
 4. By executing this Agreement, which for the purposes hereof, is deemed the Deed of Adherence for the purposes of the Partnership Agreement and making the Capital Contribution in cash, the subscriber is constituted a Partner in the Partnership.”
11. From those agreements it would seem that by subscribing to the Cytonn High Yield Solution offer, the Petitioner became constituted as a partner in Cytonn High Yield Solution LLP, the principal partner being the company. The Petitioner would be one partner alongside 3,500 other subscribers. Upto there, any investment made by the Petitioner seems to be a debt to him by the limited liability partnership and not the company.
12. The Petitioner however makes two arguments which, in his view, links the debt to the company.



13. First is that the company through correspondence and other written documents held itself out as the owner of the CHYS scheme.
14. To be fair to the company the three Agreements are made on letterheads with the name “Cytonn Investments High Yield Solutions.” It is not therefore as submitted by counsel for the Petitioner that they are on the letterheads of the company. Turning to two letters of 24th October 2019 and 6th February 2020, they are signed by the company as the principal partner of CHYS LLP. These letterheads and letters may not be unequivocal evidence that the debtor is the company.
15. More confusing however are some emails (24th October 2019 and 6th February 2020) in which the company refers to the CYHS as “our product” but through the other side of the mouth refers themselves as “your preferred investment manager.”
16. There is then part of the partnership resolution of 25th March 2020 which reads:-
 1. THAT the principal partner needs to take responsibility to act in the best interest of the CHYS and CPN Funds and all investment partners therein.”
17. From the foregoing material, the position taken by the Petitioner that the investment offer is that of the company and not the partnership may not be frivolous. Yet given the rather clear terms of the investment Agreements, the investment was into the partnership. This is a position that the Petitioner has to surmount. The conclusion to be drawn is that the dispute set up by the company as to its indebtedness to the Petitioner is not frivolous and cannot be said to be made in bad faith.
18. A second reason preferred by the Petitioner is pegged on clause 26 of the investment Agreements which reads:-

“Cytonn High Yield Solution (HYS) is backed by the corporate guarantee of Cytonn Investments Management PLC, the main Cytonn group company and also the principal partner to Cytonn HYS.”
19. Right away, and in agreement with counsel for the company, it needs to be stated that the Petition does not set up or invoke the guarantee as a reason for the debt. For example, in its letters of 14th April 2020 and 21st May 2020 in which he forewarns of these proceedings, the Petitioner addresses the company as a principal debtor. To allow the Petitioner to now rely on the guarantee clause is to allow him to stray outside his Petition.
20. Then there is a more substantial difficulty that the Petitioner faces. The corporate guarantee cannot be properly invoked unless there is an actual debt from the partnership. The company therefore takes the position that it is premature to invoke the terms of the guarantee. The Petitioner does not think so.
21. In resolving these two competing positions, the Court gives regard to the Petitioner's lawyers' letter of 21st May 2020. For context, this letter was a response to CHYS's letter of 22nd April 2020. In that letter CHYS justifies its decision for extending the maturity dates of existing investments. It explains that clause 10.3 of the Partnership Deed empowers the CHYS Board to make decisions that bind investors on the partnership and that clause 21 gives power to the principal partner to take action in the interest of the fund and its investors. In a word CHYS takes the position that it had made a lawful extension and there is no default.



22. In its response, through his lawyers, the Petitioner does not agree with the stance of CHYS and demands payment of Kshs.13,773,069/= by 25th May 2020 failing which these proceedings are threatened. Then in closing, curiously states:-

“You may also proceed to propose an arbitrator pursuant to the terms of clause 25 of the agreement signed between the parties, failure to which we shall request the chairman of the Chartered Institute of Arbitration to appoint one.”

To this proposal to proceed to Arbitration CHYS responds.

“...we are amicable to negotiations to resolve the misunderstanding before proceedings to arbitration as you accurately reference clause 25 of the investment Agreement.”

23. Clause 25 reads:-

“This Agreement shall be governed by and construed in accordance with the Laws of Kenya. In the event of any dispute with respect to the construction and performance of the Agreement, the parties shall first resolve the dispute through amicable negotiations. However, if the parties fail to reach an agreement within 15 days of commencement of the negotiations, the dispute shall be resolved through Arbitration, through the selection of a single arbitrator by the chair of the Nairobi Chapter of CIArb, in the event that the parties are unable to agree on the arbitrator.”

24. CHYS was therefore justified in seeking to first resolve the matter through amicable negotiations before resorting to Arbitration. But the important point is that the Petitioner himself, by suggesting arbitration, had embraced the position that there was a dispute in respect to the performance of the agreement that required to be resolved through Arbitration. Given the position taken by the Petitioner himself, it would now be premature to commence these proceedings before the dispute between him and CHYS LLP is submitted to Arbitration.

25. These proceedings are therefore for striking out. Yet because I did not sense that there was mala fides in commencing them, I make an order that each party bears its own costs.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

