



REPUBLIC OF KENYA



KENYA LAW
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**In re Hoggers Limited (In Administration) (Petition E003 of 2021)
[2021] KEHC 117 (KLR) (Commercial and Tax) (7 October 2021) (Ruling)**

Neutral citation: [2021] KEHC 117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
PETITION E003 OF 2021
A MABEYA, J
OCTOBER 7, 2021**

RULING

1. Before Court is a Notice of Motion dated 17/2/2021. It is brought under sections 425, 427, 428, 437, 464 of the *Insolvency Act* (“the Act”).
2. The applicant sought an order to stay all forms of execution proceedings against it through judgments, decrees and orders among others pending the determination of the liquidation petition and for an order appointing one Owen N. Koimburi as the Interim Liquidator of the company pending the determination of the liquidation petition.
3. Further, the applicant sought an order granting the interim liquidator certain powers and to direct that the remuneration and expenses of the interim liquidator be paid out of the assets of the company.
4. The grounds for the application are stated in its body and the supporting affidavit of Owen N. Koimburi, who is the administrator of the company. These include; that on 19/2/2020, the company entered into administration and as a result a statutory moratorium came into force; that by a ruling dated 20/1/2021, the court found that the termination of seven franchise agreements was not a legal proceeding and therefore not prohibited by the statutory moratorium; that due to the termination of the franchise agreements, the company is unable to continue as a going concern.
5. It was further contended that the statutory moratorium lapsed on 19/2/2021 thereby putting the company’s assets at risk of attachment unless preserved. It will therefore be in the interest of the company if an interim liquidator is appointed and a stay of execution ordered to bar any proceedings against the company by its creditors.
6. The application was opposed by the company’s creditors.
7. The first replying affidavit in opposition was lodged by Alkhaleej General Traders. It was sworn by George Munge on an undisclosed date. He averred that he carried out business with the company by supplying cheese products. That the company is indebted to him to the tune of Ksh.833, 641.70.



- That the company fraudulently transferred its business and assets to FB FRANCHISING KENYA LIMITED with the intention of defrauding its creditors.
8. It was further contended that the secured creditor, DTB Bank would be paid first with little or no chance of Alkhaleej General Traders and other unsecured creditors receiving anything. In the premises, prayed that he be allowed to continue with his case against the company, to wit, Civil Suit No. 101 of 2020 George Munge T/A Alkhaleej General Traders v. Hoggers Ltd & FB Franchising Kenya Ltd.
 9. The second opposition was by Azalea Holdings Limited t/a The Hub in Karen. This was vide grounds of opposition dated 18/3/2021 and a replying affidavit of the same date by Phillip Cauviere, its director.
 10. It was contended that the application and the petition had not provided any statements of financial position to evidence that the petitioner should be liquidated as opposed to being maintained as a going concern. That in the interest of fairness to the unsecured creditors, the administrator ought to have convened a creditor's meeting to appraise them of the company's financial position before instituting liquidation proceedings.
 11. That the petitioner had failed to provide a list of contributories contrary to section 385(1) of the *Insolvency Act* ("the Act"). The 2nd creditor urged that the application be dismissed or in the alternative, the hearing be adjourned to allow the convening of a creditors meeting. Further, it was stated that the company had continued to occupy the 2nd creditor's property without paying any rent thereby depriving the 2nd creditor a return on its investment. The 2nd creditor was owed Kshs. 48,423,992.82.
 12. The 3rd and 4th creditors, Property House Limited and The Oval Management Limited opposed the subject application jointly. They were the landlord and manager, respectively in the building known as The Oval wherein the company is a tenant. The replying affidavit was sworn by Devdutt Jayantilal Haria, on 26/3/2021.
 13. It was contended that the company was a tenant on a six-year lease from 1/3/2014. As at the time of lodging the affidavit, the company was indebted to the tune of Kshs. 20,557,481.61 to the landlord and Kshs. 2,732,973.62 to the manager which amount continued to accrue as the company remains in possession of the premises. They urged the court do order the surrender of the premises failing of which rent and service charge.
 14. The 5th creditor was Sohanson Properties Limited. It opposed the application vide a replying affidavit sworn on 22/3/2021 by Rajinder Singh Sohan. It was averred that the company was indebted to the 5th creditor to the tune of Kshs. 16,600,851.58 in rent arrears.
 15. The 6th creditor that opposed the subject application was Levy Services at Tourism Fund. It opposed the application vide the replying affidavit of Charles Okeyo sworn on 3/5/2021. According to him, the company was eligible to pay 2% tourism levy as provided for in section 105 of the *Tourism Act 2011* to the Tourism fund. That the company owed the fund a sum of Kshs.168,097,280.44 as at March, 2021.
 16. The company replied to the replies vide a further affidavit by Owen N. Koimburi sworn on 9/4/2021. He stated that the court has the power to grant the orders sought if satisfied that the company is unable to pay its debts.
 17. That as of March 2021, the company's assets stood at Kshs. 119,352,853/= while its total liabilities were estimated at Kshs. 258,154,392/=. The assets were therefore less than the company's liabilities. That the assets available to the unsecured creditors



18. amounted to only Kshs.8,593,772.00 against a total unsecured creditor balance of Ksh.226,748,164/-. He produced the company's financial statement to back his averments.
19. The applicant averred that it was not a requirement to convene a creditors meeting when applying for liquidation by the court which was only a requirement under a creditors voluntary liquidation. That the creditors will have the chance to present their claims during the liquidation process once the orders sought are granted. That due to the termination of the franchise agreements, the company cannot continue as a going concern.
20. In an affidavit sworn by Andrew Blackbeard on an undisclosed date, Famous Brands Management Company (PYT) (hereinafter 'FBMC') confirmed that it manages the Steers and Debonairs Pizza brands by virtue of having been granted license agreements over the two brands. That it had terminated the franchise agreements with the company and it was owed a sum of Kshs. 6,116,231.49 in royalties.
21. The Court has carefully considered the entire record including all the submissions filed by the parties. The first issue for determination is whether the Court should stay all execution proceedings pending the determination of the liquidation petition.
22. Simultaneous with the filing of the present application, the administrator lodged a petition dated 17/2/2021 wherein he sought to have the company liquidated by the Court under the provisions of the *Insolvency Act*.
23. Section 428 of the Act provides: -

- “(1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may—
- (a)
 - (b) if proceedings relating to a matter are pending against the company in another court—apply to the Court to restrain further proceedings in respect of that matter in the other court.
- (2) On the hearing of an application under subsection (1)(a) or (b), the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.”

24. In *Kagwimi Kangethe & Co. Advs v Olerai Nurseries Limited* , it was held: -

“The Winding Up petition was filed in Court E008 of 2019 by the Company pending hearing and determination. These facts are not contested. Section 428(1) 430 & 431(1) of the *Insolvency Act* are applicable in this case. In a nutshell, that once the Liquidation process commences then the execution process against the Company ought to halt. Consequently, proceedings leading up to execution against the Company are put on hold awaiting the finding on whether the liquidation order shall be issued and liquidator appointed or not”.

25. In *Kinyanjui Njuguna & Co Advocates v Invesco Assurance Limited* , it was held that: -

“In view of the foregoing, Section 431 of the *Insolvency Act* provides that liquidation of the company commences when the application for the liquidation order has commenced and, in this case, the day the Petition was presented before court. This means that the proceedings



leading up to the execution against the Company by virtue of the above section should be put on hold”.

26. In the present case, the liquidation petition was lodged in Court on or about the 17/2/2021. That is when the liquidation is deemed to have commenced. From the evidence on record, it is clear that the company is insolvent in that it cannot pay its debts. Even from the responses by the creditors, it is clear and beyond peradventure that the company’s assets are outstripped by its debts.
27. Since the administration moratorium lapsed on 19/2/2021, each of the company’s creditors may pursue court cases and/or enforcement proceedings in an attempt to recover the debts owed to them.
28. In view of the foregoing, under section 428 of the Act, it will be in the best interest of all the creditors and justice, that the assets of the company are preserved. I do not believe that the provisions of the law that empower the Court to stay proceedings in an insolvency situation are contrary to Article 50 of the *Constitution of Kenya* as contended by one of the creditors.
29. Accordingly, the prayer for stay is well merited and the same is granted.
30. The next issue for consideration is whether the Court should appoint the administrator as an interim liquidator of the company pending the determination of the liquidation petition. It was proposed that Owen N. Koimburi be appointed as the interim liquidator and it was prayed that he be granted the power to carry on the business of the company for the beneficial liquidation.
31. Section 437 of the *Insolvency Act* provides: -
 - “(1) The Court may appoint a provisional liquidator either on or after, or at any time before, the making of a liquidation order in respect of a company.
 - (2) ...
 - (3) A provisional liquidator shall perform such functions and may exercise such powers as the Court may specify in the order appointing the provisional liquidator”.
32. In the present case, a petition has already been presented. The evidence contained in the supporting affidavit is overwhelming that the company cannot meet its financial obligations. A financial statement that was produced attests to that. I find and hold that the evidence warrant the appointment of an interim liquidator pending the determination of the liquidation petition. He shall be responsible for the preservation of the assets of the company which will be used for the repayment of the debts owed to all the creditors.
33. The said Owen N. Koimburi having been the administrator of the company, is well versed with the affairs of the company. Further, he being qualified under the Act, the Court hereby appoints him as the interim liquidator.
34. Accordingly, the application is allowed and the Court makes the following orders: -
 - a) A stay of all proceedings leading up to execution against the company.
 - b) Owen N. Koimburi** is hereby appointed as the provisional liquidator with the following functions: -
 - i) To trace, take possession of, collect, recover, protect, preserve the value of the assets of the company pending the determination of the liquidation petition.



- i1) To carry on the business of the company for the benefit of the liquidation herein.
- c) Each party to bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021.

A. MABEYA, FCI Arb

JUDGE

