



**Serviscope (E.A) Ananas v Ltd (Insolvency Cause E036 of 2020)  
[2021] KEHC 241 (KLR) (Commercial and Tax) (17 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E036 OF 2020  
A MABEYA, J  
NOVEMBER 17, 2021**

**BETWEEN**

**SERVISCOPE (E.A) ANANAS ..... PETITIONER**

**AND**

**ANANAS CONSOLIDATED GROUP LTD ..... RESPONDENT**

**RULING**

1. The petitioner lodged the Petition dated 2<sup>nd</sup> November 2020 seeking an order for the liquidation of the respondent (hereinafter “Company”) under the *Insolvency Act*, 2015. It was on account of an outstanding debt of Kshs. 4,154,329/- plus interest thereon for goods sold and delivered as well as services rendered to the Company.
2. The petitioner states that the respondent has failed to pay or satisfy the debt amount despite several requests and demands and that neither the petitioner nor any person on their behalf holds any security on the respondent’s assets for payment of the debt amount. The petitioner also avers that the debt amount owed by the Company is within the prescribed insolvency level in accordance with the *Insolvency Act*. According to it, the respondent is insolvent and/or unable to settle its debts.
3. The respondent opposed the Petition vide Grounds of Opposition dated 15<sup>th</sup> December 2020 and a Replying Affidavit sworn on 25<sup>th</sup> January 2021 by its Director YAACOV MAIMO.
4. Subsequently, the respondent has filed an Amended Notice of Motion dated 8<sup>th</sup> February 2021 under section 10 of the Insolvency Regulations, 2016, Order 51 of the Civil Procedure Rules, Section 3 and 3A of the *Civil Procedure Act*. In the Motion, the respondent seeks for an order declaring the advertisement issued on 3<sup>rd</sup> February 2021 in respect of the petition a nullity. It also seeks to strike out the petition for being an abuse of the court process.



5. The application is supported by the grounds on its face as well as the supporting and supplementary affidavits of YAACOV MAIMO sworn on 26/1/2021 and 12/3/2021, respectively. The respondent denies being indebted to the petitioner in the sum of Kshs. 4,154,392/- as claimed or at all. It contends that there is a substantial issue relating to the performance of the contract by the petitioner that cannot be determined in the context of the petition but in a civil claim. The respondent also avers that it is solvent and very capable of paying any legitimate debts.
6. It contends that in the year 2018, it contracted the petitioner to install among other things a kitchen and bar equipment, a kitchen and toilet extraction ducting system and hoods at its Ananas Food Court at an agreed consideration of Kshs. 14,595,471/-. The petitioner delivered and installed the kitchen and bar equipment and was paid a total of Kshs. 10,571,203/-.
7. However, the installed kitchen, toilet ducting system and hoods were not fit for the purpose and the respondent brought these deficiencies to the attention of the petitioner vide an email dated 13/5/2019. The petitioner's representative responded and acknowledged that the system was indeed not working and thus proposed a variation of a 50% discount on the old installation and the installation of a new ducting system at the cost of Kshs. 1,485,086/-. The respondent was not agreeable to that proposal as they had already made all the requisite payments for the works and asked them to rectify their mistake.
8. The respondent contends that is not aware of how the disputed amount of Kshs. 4,154,329/- was arrived at by the petitioner since it had to complete the works on its own and incurred extra cost due to the petitioner's nonperformance. Further, that upon being served with the Statutory Demand Notice, it filed a response to the Statutory Notice as well as an application dated 22/7/2020 seeking to set aside the statutory demand and the application is still pending determination before this court. In this regard, the petition has been brought in bad faith to pressure it to pay a disputed debt that is not due and payable.
9. The petitioner opposed the application through a replying affidavit of ALEEM AHMED sworn on 23/2/2021. It contends that the debt amount of Kshs. 4,154,329/- has remained unpaid since March 2019. It denies the existence of any dispute relating to the performance of the contract since the contract was fully performed and invoiced. In its view, the alleged dispute is an attempt by the respondent to avoid paying the debt amount due and owing to the petitioner.
10. The petitioner further contends that it completed all the works including supplementary works commissioned by the respondent. That the respondent was currently using the extraction systems fitted by the petitioner two years ago without any changes or modification. That a report by the County Health Services under the Sub County Public Health Office - Westlands made on 17/2/2021 confirms that the toilet and kitchen extraction systems are in a working condition.
11. That the petition is properly before the proper Court because the respondent is unable to pay the debt amount. That on numerous occasions, its representatives have made personal visits to the respondent's premises to demand for payment of the debt amount but the respondent has indicated that its financial position was not sound and has been asking for more time to pay.
12. That in any event, the application seeking to set aside the Statutory Demand was overtaken by events upon the filing of the petition. That it will be highly prejudicial to the petitioner to have its petition determined at an interlocutory stage without it being heard on its merit. That the application should therefore be dismissed with costs and the petition be set down for hearing.
13. The application was canvassed by way of written submissions. The thrust of the respondent's submissions is that the petition has been brought in bad faith since it is grounded on a disputed debt.



That this cannot be the subject of liquidation proceedings since the respondent is liquid and capable of meeting its financial obligations.

14. Reliance was placed on [Universal Hardware Limited v African Safari Club Limited](#) [2013] eKLR, [KITMIN Holding Limited v Noble Resources International PTE Limited](#) [2018] eKLR and [Re African Safari Club Ltd](#) (2006) eKLR to support that proposition.
15. On the other hand, it is the petitioner's submission that the dispute is neither substantive nor bona fides. That it is only being raised by the respondent to avoid paying the debt amount. It cited several cases, inter alia, *Universal Hardware Limited v African Safari Club Limited (supra, Tanganyika Produce Agency Limited* (1957) E.A. 241 and *Re Anglo-Bavarian Steel Ball Company (2)* [1899] W.N 80, for the proposition that an objection to a winding up petition would fail if a company fails to demonstrate reasonable grounds for disputing a debt.
16. It maintains that the respondent is insolvent as it has failed to present a statement of accounts or audited books to show that it is able to pay its debts as and when they fall due. The petitioner therefore urges that the application be dismissed with costs to.
17. The threshold for liquidating a company on the basis of its inability to pay its debts when they become due is well settled. In the Court of Appeal decision of [Universal Hardware Limited v African Safari Club Limited](#) [2013] eKLR, Makhandia J.A observed that:

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceedings on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis”.
18. The court went on to analyze several decisions including *Mann v Goldstein* (1968) 2 All ER 769, *Cruisair Limited v CMC Aviation Ltd (No. 2)* [1978] KLR 131 and *Re: Global Tours and Travels Limited* [2001] 1 EA 195 then concluded that: -

“The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.”
19. It is not denied that the respondent contracted the petitioner sometime in 2018 to deliver and install among other things a kitchen and bar equipment, a kitchen and toilet extraction ducting system and hoods at its hotel premises for a sum of Kshs. 14,595,471/-. It is also not disputed that the respondent paid a sum of Kshs. 10,571,203/- on account of the work done by the petitioner.
20. However, it is clear from the email correspondence exchanged between the parties and produced before me that the respondent was dissatisfied with the petitioner's workmanship. The respondent complained to the petitioner about the quality of work and even asked the petitioner to take back some of the equipment.



21. It is also evident from the said correspondence that there was a variation of the works but the parties are not agreeable as to at whose instance the same was done. It would appear that the while the respondent believes that the variation was undertaken to address it's dissatisfaction with the petitioner's performance, the petitioner believes that this was done on the respondent's instructions.
22. In addition, the evidence on record shows that the allegation by the petitioner that the respondent made several promises to settle the debt amount. In the email of 29/10/2019, the respondent informed the petitioner that whatever amount is remaining would only be payable after completion of the works which according to it had not been done as at the time the petition was filed.
23. In my view, the foregoing shows that the respondent genuinely disputes the debt amount on substantive and bona fide grounds which would constitute a bonafide and valid defence. What this means is that the petitioner's claim is best suited for interrogation and resolution as a civil claim and not through the liquidation petition herein.
24. Courts have generally considered the striking out of pleadings to be a draconian measure that should only be exercised in the clearest cases. I am convinced that this is one such case as the petition calls for striking out for being an abuse of the court process. The striking out of the petition automatically renders the advertisement of 3/2/2021 in respect thereof a nullity.
25. In the premises, the Amended Notice of Motion dated 8/2/2021 is hereby allowed in terms of prayers nos. 3, 4 and 5.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**

