



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E168 OF 2019

IN THE MATTER OF ABDERDARE STEEL AND HARDWARE LIMITED

AND

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

AND

IN THE MATTER OF THE COMPANIES ACT, CAP 486 (NOW REPEALED)

JUDGMENT

1. Though the petition filed on 29th November 2019, the petitioner/creditor, **Shreeji Enterprises(K) Limited** petitions this court for a liquidation order in respect of **Abderdare Steel and Hardware Limited** (hereinafter “**the company**”) on the grounds that:

- i. The company has within the period of one year preceding the presentation of this petition carried on business in Nairobi within the jurisdiction of this court.
- ii. As at 14th January 2018, the company is justly and truly indebted to the petitioner in the aggregate sum of kshs 14,056,531.61 (Kenya shillings Fourteen million, fifty-six thousand, five hundred and thirty-one and sixty-one cents), (hereinafter “the debt”) arising out of a judgment and decree of the High Court of Kenya at Nairobi in HCCC No. 37 of 2017, **SHREEJI ENTERPRISES (K) LIMITED –VS- ABDERDARE STEEL & HARDWARE LIMITED** which the company has failed to settle.
- iii. The petitioner does not, nor does any person on its behalf, hold any security on the company’s assets for the payment of the debt amount.
- iv. The petitioner has made repeated requests to the company for the payment of part payment of the debt amount, but the company has failed or neglected or refused to pay the debt amount.
- v. The petitioner has attempted to attach the company’s assets in settlement of the decree but has been unsuccessful as the said assets have either been sold off or hidden.
- vi. The debt amount owed to the petitioner by the company is within the prescribed Insolvency level in accordance with the Insolvency Act 2015.
- vii. On 21st January, 2019 the petitioner served a statutory demand upon the company at its registered office in Nairobi demanding payment of the debt amount within 21 days after the service of the statutory demand. A copy of the statutory demand dated 14th January, 2019 was attached to the affidavit and marked as ANNEXURE -3.
- viii. The company, after the lapse of the 21 days given under the statutory demand, has neither complied with nor set aside the statutory demand for the payment of the debt amount.
- ix. It is therefore deemed that the company is unable or has no reasonable prospects to pay its debts and the debt amount owed to the petitioner.

x. In the circumstances stated above, it is only fair, just and equitable that the court grants the petitioner a liquidation order for the liquidation of the company.

xi. The company has committed various bankruptcy offences within the last 2 years before the filing of this petition namely; failure to pay the debt amount, or any part thereof to the reasonable satisfaction of the petitioner within 21 days after service of the petitioner's Statutory Demand.

2. At the hearing of the petition **Mr. Dhaval Soni**, the petitioners' Director testified that:

1. The petitioner sued the company in HCCC No. 37 of 2017 over a debt owed on account of hardware goods that they had supplied the company on credit.

2. The company has been unable to satisfy the decree despite attempts by the petitioner to recover the decretal sum.

3. The petitioner served the company with a statutory demand under Section 384 of the Insolvency Act. The statutory demand was duly served upon the company there is an affidavit of service on record. Service of the statutory demand has not been challenged/contested.

4. The company neither settled the amount nor did it apply to set aside the statutory demand as required under the Insolvency Act, if it wished to contest the debt.

5. This prompted the filing of the petition herein.

6. The petition was duly served upon the company by way of advertisement in the standard newspaper issue of 20th January, 2020. There is an affidavit of service on record and the court confirmed that the service was properly done.

7. The company neither opposed the petition nor did it attend court during the hearing on 30th January 2020 despite having been properly served with both the petition and the hearing notice.

8. The petitioner's averments in the petition and the testimony by the petitioner's witness are therefore uncontroverted.

3. At the close of the plaintiffs, **Ms. Were & Oonge Advocates** for the petitioner submitted the creditor had demonstrated that the company is truly indebted to it to the sum of Kshs 14,056,531.61, is unable to settle its debts and that the creditor is therefore entitled to the orders sought.

4. I have considered the instant petition, the testimony of the petitioner's witness and the submissions made by counsel.

5. Section 384(1)(2) of the Insolvency Act (hereinafter "**the Act**") stipulates as follows: -

1. For the purposes of this part, a company is unable to pay its debts-

a. If creditor (by assignment or otherwise) of 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.

2. 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).

6. Section 425(1) (b) of the Act on the other hand states that:

"425". An application to the court for the liquidation of a company may be made any or all of the following: -

a.

b. A creditor or creditors (including any contingent or prospective creditor or creditors)."

7. In *Re Kipsigis Stores Ltd* [2018] e KLR, it was held:-

"The creditor/petitioner has proved to the required standard of proof that it is a creditor for the purposes of Part IV of the Insolvency Act..... The company has not challenged the claim nor bothered to appear after several services with hearing

notices.....The petitioner had demonstrated that statutory demand was issued for the purposes of Section 384 of the Insolvency Act. The notice was not honoured provoking this petition..... There is no dispute over the indebtedness neither has the company challenged or contested the petition..... I further find and hold the petitioner has discharged the burden of proof as required by law.”

8. In the present case, I am satisfied that the petitioner has proved its case against the company to the required standards. I find that the company owes the petitioner the sum of Kshs 14,056,531.61 which it has been unable to pay.

9. Consequently, I allow the petition in the following terms:

- a. That the company is hereby liquidated under the provisions of the Insolvency Act 2015;**
- b. That the Official Receiver is hereby appointed as the Provisional Liquidator;**
- c. That the costs of this petition is granted to the petitioner and shall be paid out of the company’s assets**

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Muriungi for the petitioner

Court Assistant- Sylvia