



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

INSOLVENCY PETITION NO. E015 OF 2018

IN THE MATTER OF UKWALA SUPERMARKET LIMITED

AND

IN THE MATTER OF APPLICATION FOR LIQUIDATION

VIJAY JAYANTILAL DODHIAAPPLICANT

RULING

1. Ukwala Supermarket Limited, hereinafter the Company, has Petitioned that it be declared insolvent and for an appointment of a Liquidator. The Petition was advertised on 15th December 2019 in a daily newspaper, the Daily Nation.

INTRODUCTION

2. In any Petition brought for the purposes of liquidating a Company, the Court has the discretion once the Petitioner has established the right to bring a Petition and established the grounds alleged, to make or deny the order sought. By the same vein the Court also has an inherent jurisdiction to strike out any Petition which is bound to fail or is an abuse of the process of the Court.

3. The Company is business with two Directors namely Rohit Maganlal Shah and Vijay Jayantilal Dodhia. The shareholders as per the Memorandum and Articles of Association are (i) Kalpesh Jayantilal Jethalal Shah, (ii) Ajey Velji, (iii) Rohit Maganlal Shah and (iv) Vijay Jayantilal Dodhia. The Company held a Board of Directors meeting in which only two of the Directors resolved that the Company be liquidated because of its inability to pay its debts and meet its financial obligations. There are over 500 creditors, none of which has responded to this Petition although service was effected on the classified page of one of the Daily Nation newspaper.

ISSUE

4. Whether the Court should declare the Company insolvent and place it under an interim Liquidator.

RELEVANT PROVISIONS OF THE INSOLVENCY ACT, NO. 18 OF 2015

5. Part VI of the Insolvency Act, 2015 provides for liquidation of companies and Section 423 gives the High Court the jurisdiction to supervise the liquidation of companies. It distinguishes between voluntary liquidation and liquidation by the Court. The matter before the Court is clearly not a voluntary liquidation and must be seen to have been brought pursuant to Section 424 (a) and 425(1) (a). These provisions merely permit and provide for liquidation of a Company by the Court.

6. Section 424 (1) of the Insolvency Act 2015 reads as follows:

“424. (1) 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) Being a public Company that was registered as such on its original incorporation has not been issued with a trading certificate under the companies Act 2015, more than twelve months has elapsed since it was so registered.

(c) The Company does not commence its business within twelve months from its incorporation or suspends its business for a whole year. Except in the case of a private Company limited by shares or by guarantee the number of members is

reduced to below two.

(d) The Company is unable to pay its debts.

(e) The Court is of the opinion that it is just and equitable that the Company should be liquidated.

6. Section 425 of the Insolvency Act provides for persons eligible to apply to the Court for liquidation.

“(a) The Company or its Directors.

(b) A creditor or creditors

(c) A contributory or contributories of the Company

(d) Provisional Liquidator or an Administrator of the Company”

7. 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 Insolvency 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.”

ANALYSIS

8. The Insolvency Act confers wide judicial discretion on liquidation Petitions of companies. It is trite law that if the Court sees a Petition to liquidate a Company which is not brought in good faith it would apply its legal mind to dismiss it with costs. See the case of **MATIC GENERAL CONTRACTORS LIMITED VS. THE KENYA POWER AND LIGHTING COMPANY LIMITED (2001) LLR 4837 (CAK)** where the Court held that;

“It is thoroughly settled now that, on a Petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a Petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the Company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the Petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Acts to be made the vehicle of oppression.”

9. Liquidating a Company is a draconian step which as the Retired Justice Kwach in **Matic General Contractors Limited (Supra)** said amounts to ‘corporate execution’. See also the case of **KENYA POWER AND LIGHTING COMPANY LIMITED VS. NATIONAL CEREALS & PRODUCE BOARD (2002) 1 KLR 652**, Ringera J (as he then was) likened it to ‘passing a death sentence on an individual.’

10. The Petitioner has not directly engaged the over 500 creditors to seek solutions to settling their debts. Neither have they directly engaged the preferential creditor, Kenya Revenue Authority. However, the Petitioner avers that the liquidation Petition was sufficiently served by way of advertisement, dated 15th December 2018, published in the classified page of the Daily Nation. Indeed, it is a long-established principle of Company law that Directors must act in the best interests of their Company, but once the Company approaches insolvency, their first duty must be to the creditors. Once it has been established that the Company cannot pay its debts as and when they fall due, a responsible Director should take steps to protect creditors, and if a solution to the problem cannot be found, the Company may enter formal insolvency proceedings.

11. This Court is keenly aware that none of the creditors are aware of this Petition because no responses have been filed. It is quite plausible that the creditors did not see the Petition in the newspaper because not all Kenyans read every edition, or every page, of the Daily Nation on the very day of publication. I am of the view that the creditors have not been adequately served, and have not been given the opportunity to contest this liquidation Petition.

12. Section 427 of the Insolvency Act 2015 gives the Court wide powers on hearing liquidation applications as hereunder;

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.

13. For the Court to grant an order for liquidation, the Court must be satisfied that the creditors are aware of the Petition and are given sufficient time to respond. The Court, must thus have regard to a number of diverse and contrasting factors before reaching an ultimate conclusion. Without limitation, the following factors to be considered in the exercise of discretion whether or not to make a liquidation order include; (i) the effect of an order under *Section 425* would have on the rights of secured and unsecured creditors as balanced with that of the Company, (ii) the insolvency level of the Company both commercially and under the balance sheet. In this regard, the Court is concerned that the level of the Company's indebtedness has not been clearly revealed and neither can it be easily discerned from the documents availed by the Company. Moreover, the Court ought to keep in mind the general objectives of administration as a process in Company law often invited as an alternative for an ailing Company instead of liquidation.

14. Indeed, a creditor ought to be informed of insolvency proceedings for liquidation of a Company unable to pay its debts and allow such other creditors to join in such proceedings. Another factor that prompts the Court to adjourn the Petition is the Company's conduct since the liquidation Petition was filed. It is common knowledge and now on record that the Company has not directly engaged its creditors by directly serving them with the liquidation Petition. It has also not directly engaged the preferential creditor, Kenya Revenue Authority at the very least. All creditors (secured and unsecured) ought to be afforded the opportunity to know about the Petition which unfortunately has not been the case.

CONCLUSION

15. The Court appreciates that the Petitioner put out an advertisement with the intention of providing information to the general public so that anyone with interest in the dispute may join the Petition. However, this has proved to be ineffective. I hold the view that a Court of law should be hesitant to shut its doors to any creditor by denying it the opportunity to ventilate its grievances.

16. For that reason, the Court adjourns the Petition and orders the Petitioner to directly serve the liquidation Petition to the other two shareholders as per the Memorandum and Articles of Association, namely Kalpesh Jayantilal Jethalal Shah and Ajey Velji. Further, the liquidation Petition shall be directly served on the Kenya Revenue Authority as well as at least 50 percent of the over 500 creditors. The Petitioner should also serve the Petition by publication in a newspaper of national circulation by following the guidance provided in Rule 12 (3) (b) and (c) of the Elections (Parliamentary and County) Petition Rules, 2017 which states as follows:

“12 (3) Where a Petition is served by publication in a newspaper as provided under sub- rules (1)(b) and (2) (c), the advertisement shall be sufficient if it is—

(b) is of at least font size twelve; and

(c) is captured in dimensions of not less than ten by ten centimeters.”

18. In the final analysis, the following orders are granted

- i. The Petition be directly served to the Kenya Revenue Authority, which is a preferential creditor and at least 50% of the creditors.**
- ii. The liquidation Petition be and is hereby ordered to be prominently advertised in a newspaper of national circulation as per the guidance above within 21 days from today's date.**
- iii. The Petitioner shall seek the services of a Licensed Insolvency Practitioner to act as a Liquidator.**
- iv. At the reading of this Ruling a date will be fixed for the hearing of the Petition.**

DATED, SIGNED and DELIVERED at NAIROBI this 8TH day of MAY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE APPLICANT

..... FOR THE COMPANY