



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
COMMERCIAL & TAX DIVISION
INSOLVENCY CAUSE NO. 7 OF 2016
IN THE MATTER OF GEM CM CONSTRUCTION LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015
RULING

1. The Powers of a Court in hearing a liquidation Application are provided for in Section 427 of The Insolvency Act which reads:-

- “(1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate:
- (a) an order dismissing the application;
 - (b) an order adjourning the hearing, conditionally or unconditionally;
 - (c) an interim liquidation order; or
 - (d) any other order that, in its opinion, the circumstances of the case require.
- (2) However, the Court may not refuse to make a liquidation order on the ground only that the company’s assets have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets.
- (3) If the application is made by members of the company as contributories on the ground that it is just and equitable that the company should be liquidated, the Court shall make a liquidation order, but only if of the opinion that—
- (a) that the applicants are entitled to relief either by liquidating the company or by some other means; and
 - (b) that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated,
- (4) Subsection (3) does not apply if the Court is also of the opinion that—
- (a) some other remedy is available to the applicants; and
 - (b) they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy”.

These powers are wide so that a Court can apply its mind on the circumstances of the case before it and make orders that are appropriate.

2. By dint of Section 424 (1) (e) of The Act, a Company may be liquidated by Court if the Company is unable to pay its debts. In the matter before me, there is evidence that the Company is unable to pay its debts to the Bank within the meaning of Section 384 (1) of The Act which provides:-

- “(1) For the purposes of this Part, a company is unable to pay its debts—

- (a) if a creditor (by assignment or otherwise) to 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".

Indeed, as pointed out by Counsel for the Bank, there is a concession by the Company of this inability.

3. That said, I have looked at annexure MKK 6 to the affidavit of Martin Kinoti Kinyua made on behalf of the Company as a reply to the liquidation Petition. It is a Consent Order in Nairobi Insolvency Cause No. 3 of 2016, (In the matter of liquidation of Chagem Power Limited). My attention is on item 7 of the Consent which reads,

"That the Petitioner to forthwith enter into an arrangement to secure the facility advanced by Jamii Bora Bank and free the 2nd Respondent as a Guarantor and also discharge the 2nd Respondent property currently securing these facilities".

The Petitioner therein is Mr. Martin Kinoti Kinyua.

4. Now this Court is aware of the Petitioner's Counsel forceful submissions that the Company's assertion that the loan is secured is not proved and relies on the Provisions of Section 107 and 109 of The Evidence Act. Yet again that assertion has not been rebutted unequivocally by the Bank by way of an affidavit.

5. Given that liquidation of a Company is really the death knell of a Company and is obviously a drastic Order, this Court is reluctant to make such an Order unless it is certain that it is the only appropriate Order to make. So as to satisfy myself fully as to which way to go, I direct that the parties furnish this Court with affidavit evidence as to whether item 7 of the Consent referred to in paragraph 3 herein was effected and whether the debt owed by the Company to the Bank is secured. And if so, the nature and details of the security and why they have not been enforced. The Court shall thereafter make its final orders on the Request for liquidation.

Dated, Signed and Delivered in Court at Nairobi this 6th day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kimani for Petitioner

N/A for Respondent

Nixon - Court Assistant