

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY CAUSE NO. E002 OF 2020
IN THE MATTER OF MOTION PICTURES LIMITED

AND

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

AND

IN THE MATTER OF AN APPLICATION FOR LIQUIDATION

-BETWEEN-

FRANCIS GICHABA GACHAGUA.....PETITIONER

-VERSUS-

JOHN FRANCIS KARIUKI THEURI.....RESPONDENT

KIU CONSTRUCTION LIMITED.....INTERESTED PARTY

JUDGMENT

1. The petitioner filed a Liquidation Petition dated 6th February 2020 against the respondent seeking an order for the liquidation of Motion Pictures Limited (hereinafter referred to as the company), and that the Court makes such orders as may be necessary and just in the premises.
2. The petition is premised on the grounds on the face of the petition, and it is supported by a verifying sworn on 6th February 2020 by Mr. Francis Gichaba Gachagua, the petitioner herein and also a Director and Shareholder of the company. The petitioner stated that the company was incorporated on 29th June 2009, with a nominal capital of Kshs.1,000,000/=, divided into 100,000

shares valued at Kshs.10/= each, and that the company is based in Westlands, Nairobi, and operates in advertising, public relations, business promotion, and consulting in local and international markets. He averred that the company is jointly owned by Messers. Francis Gichaba Gachagua and John Francis Kariuki Theuri, who each hold equal shares and serve as Directors. Mr. Gachagua claimed that since the company's incorporation, the respondent has shown little interest in its operations or management, limiting his role to signing cheques as a mandated signatory.

3. Further, that relations between the petitioner and the respondent (Directors) have broken down, with the respondent refusing to participate in key company functions or authorize critical payments, including staff salaries, unless the petitioner buys out his shares. He contended that this lack of cooperation has severely disrupted the company's operations and frustrated its daily management. The petitioner argued that the company cannot meet its financial obligations, including unpaid November 2019 staff salaries, despite receiving funds from Bosch under a vital marketing agency agreement. He averred that employees have threatened to report the company to Bosch, risking breach, contract termination, and damages. The petitioner asserted that the respondent has refused to authorize payments or address company challenges unless he buys his shares. In addition, that communication between the Directors is completely severed, resulting in operational paralysis.
4. The petitioner contended that despite efforts to resolve conflicts, the respondent remains uncooperative and indifferent to the company's welfare. He noted that the company has net assets of approximately Kshs.37,681,256.43 but it is burdened by liabilities, including a heavily

encumbered property in Thindigua. Citing management deadlock and declining commercial viability, the petitioner argued that liquidation is the most just and equitable solution.

5. In opposition to the petition, the respondent filed a replying affidavit and a further affidavit sworn on 20th July 2023 by Mr. John Francis Kariuki Theuri, the respondent herein. He averred that the company remains a going concern and that the petition to wind it up is baseless, and only aimed at destabilizing it and exerting undue pressure. He noted that the alleged issue of a delayed cheque for November 2019 salaries was resolved when the cheque was signed by both Directors. The respondent stated that on 1st October 2019, the Board resolved that he would purchase the Thindigua Property for Kshs.48,000,000/=, personally settling the Equity Bank loan through his company, Kiu Construction Limited. He averred that although a Sale Agreement was prepared and signed by him, the petitioner rejected it and subsequently filed this petition.
6. The respondent claimed that the Thindigua property was transferred to him through a Board Resolution and seeks the Court's intervention to compel the petitioner to sign the transfer documents. He further accused the petitioner of registering a new company, One Pulse Kenya, on 12th February 2021, and diverting the company's business and goodwill for personal gain. Mr. Theuri also claimed that the petitioner converted uncharged company assets for personal use, causing the company losses of approximately Kshs.62,000,000/=. The respondent emphasized that after saving the Thindigua property from auction by settling a Kshs.33,470,000/= loan, he is entitled to its ownership. He urged the Court to dismiss the petition, enforce

the October 2019 Board Resolution, and hold the petitioner accountable for misusing company assets.

7. The interested party also filed a replying affidavit to the instant petition sworn on 28th March 2024 by Mr. John Francis Kariuki Theuri, the respondent herein and a Director of the interested party company. Mr. Theuri stated that the interested party purchased the Thindigua property in 2018 for Kshs.48 Million and settled a Kshs.28,320,000/= loan with Equity Bank, with remaining payments ongoing. He argued that the property should be transferred to the interested party before any liquidation proceedings. He averred that despite a Board resolution confirming the sale, the petitioner has refused to honour it, thus undermining the Agreement. Mr. Theuri accused the petitioner of using the liquidation petition to oppress the interested party and avoid the property Sale Agreement, claiming that liquidation before transfer would cause irreparable financial loss to the interested party.
8. The instant petition was canvassed by way of written submissions. The petitioner's submissions were filed by Jim Akach Advocate on 16th December 2023 & 27th May 2024. The respondent's submissions were filed by the law firm of Boniface Masinde & Co. Advocates on 21st May 2024, and the interested party's submissions were filed on 21st May 2024 by the law firm of Julia Kariuki & Co. Advocates.
9. Mr. Akach, learned Counsel for the petitioner cited Sections 423(1), 424(1), and 425(1) of the Insolvency Act, arguing that the petition for liquidation is compliant with the said provisions. He explained that the company has two Directors and Shareholders, the petitioner and the respondent herein and the petition was filed by one Director on grounds of it being just and equitable. Mr. Akach highlighted that the respondent did not participate in the

company's daily management, but instead, he used his mandatory bank signature to frustrate the petitioner. He detailed instances where the respondent refused to sign cheques for essential payments, such as salaries and statutory remittances, despite the company having funds. He submitted that in November 2019, the respondent delayed signing a cheque for employee salaries, despite Bosch depositing the necessary funds, which led to Bosch terminating the agreement.

10. He submitted that although the cheque was eventually signed following a Court-ordered mediation, the petitioner stated that the company's reputation had already been irreparably damaged, making the situation unsalvageable. Counsel relied on the case of **In Re Garnets Mining Co. Ltd** [1978] KEHC 8 (KLR), and contended that the company in this instance is no longer operational due to the respondent's actions, which have frustrated its major clients. He stated that the only way to settle the company's liabilities is by selling its assets. It was submitted by Counsel that the petitioner has provided a financial statement showing that after settling liabilities, a surplus would remain, which would be divided between the petitioner and the respondent as the sole members of the company. Mr. Akach concluded that the petitioner has made out a case to warrant liquidation of the company on the grounds that it is just and equitable to prevent the company from becoming insolvent.
11. Mr. Akach for the petitioner argued that liquidation was anticipated by both Directors, as evidenced by a Board resolution to liquidate the company after settling its liabilities from the Thindigua property sale proceeds. Additionally, that the respondent had indicated plans to liquidate the company in December 2019 if the petitioner did not offer to buy it. Counsel

submitted that the current petition merely fulfills what was previously anticipated as a reasonable resolution. He also noted that while the respondent claims to have settled the loan owed to Equity Bank, if true, the respondent would need to present proof of his debt as a creditor in insolvency proceedings, which are meant to ensure fairness and transparency, so that no creditor or member unfairly benefits. Counsel concluded by stating that there is no reason to prevent liquidation, as neither Director/Shareholder wants to run the company, and there is no resolution to the deadlock, making liquidation just and equitable.

12. Mr. Masinde, learned Counsel for the respondent submitted that the Court had already found no evidence to justify the just and equitable liquidation of the company. He referred to the Court's Ruling delivered on 7th July 2020, which stated that the petitioner had not shown that the company was no longer a going concern, and where the Court had also cautioned against interfering with the internal management of companies, particularly when alternative remedies such as arbitration, share transfer, or a derivative action were available. To this end, Mr. Masinde relied on the case of **Siro Brugnoli & another v Giancarlo Camerucci & another** [2016] KEHC 2625 (KLR). Counsel emphasized that there was no irretrievable breakdown of trust and confidence between the company's members to justify liquidation. He further stated that the respondent's delay in signing the November 2019 staff salary cheque, while seeking clarification from the petitioner, was not unreasonable, and the cheque was eventually signed.
13. Ms Kariuki, learned Counsel for the interested party submitted that the petitioner is using the instant petition as a vehicle of oppression against the interested party since once the company is wound up, the Board resolution

of 2nd October 2019 which gave the interested party the Thindigua property will effectively and automatically deny the interested party its hard earned property. Counsel relied on the case of **Joyce Murugi Njagi t/a Crossworld Institute of Professional Studies v Twiga Properties Ltd** [2022] KEHC 12 (KLR), and stated that should the company be wound up, the interested party stands to suffer irreparable loss as it is likely to lose its property having heavily invested in the payment of the huge loan arrears.

14. In a rejoinder, Mr. Akach submitted that the submissions by the respondent and the interested party that just and equitable liquidation should not be allowed when other options are available is legally correct, but in this case, there are no practical alternatives to liquidation as both parties recognized this when they entered into the 1st October 2019 Board resolution. He stated that either shareholder has shown interest in buying the other's shares, or none has refused to sell. He contended that as neither shareholder has any residual interest in the company as a going concern, liquidation is both inevitable and necessary.
15. Counsel contended that the interested party's request for declarations regarding the ownership of the Thindigua property is outside this Court's jurisdiction, and once a Liquidator is appointed, he will be responsible for confirming the company's liabilities and assets and resolving them fairly according to the law. Mr. Akach stated that the respondent's abandonment of the 2019 Board resolution has negatively affected the company. He submitted that this Court's role is to determine whether the company can continue to operate effectively, which the petitioner asserts has not been the case since 2018-2019.

ANALYSIS AND DETERMINATION.

16. I have considered the instant petition as well as the affidavit filed by the petitioner in support thereof. I have also considered the replying & further affidavits filed by the respondent & the interested party, together with the written submissions by Counsel for the parties. The issue that arises for determination is whether a liquidation order should issue against the company.
17. The instances under which a company may be liquidated by a Court are provided for under Section 424(1) of the Insolvency Act, 2015, which provides that –

“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 –***
 - i) the company has not been issued with a trading certificate under the Companies Act (Cap. 486); and***
 - ii) 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;***
- d) except in the case of a private company limited by shares or by guarantee, the number of members is reduced below two;***
- e) the company is unable to pay its debts;***

- f) at the time at which a moratorium for the company ends under section 645—a voluntary arrangement made under Part IX does not have effect in relation to the company; or*
- g) the Court is of the opinion that it is just and equitable that the company should be liquidated.”*

18. It is important to note that in seeking to have this Court liquidate the company, the petitioner is not relying on the ground that the company is unable to pay its debts as contended by the respondent. To the contrary, in urging this Court to liquidate the company, the petitioner is relying on the provisions of Section 424(1)(g) of the Insolvency Act, that it is just and equitable that the company should be liquidated. This Court has a very wide discretion to issue an order of liquidation against a company, if it finds that it is just and equitable to do so. Such discretion must not only be exercised cautiously and sparingly, but it must also be justified by sound evidence. The **Halsbury’s Laws of England 4th Edition Volume 7(2)** at page 1095 defines the term “*just and equitable*” as hereunder -

“the words just and equitable in company law are a recognition of the fact that a limited liability company is more than a mere judicial entity with a personality in law with its own: behind or among it there are individuals with rights, expectations and obligations interse which are not necessarily submerged in the company structure. ”

19. The Court in the case of **In Re Garnets Mining Co Ltd** (supra), provides a useful guide to a Court mulling over a liquidation application premised on the “*just and equitable*” Rule -

So a summary of the way to approach the issue of whether or not to wind up a company under the just and equitable rule is this. It is a matter for the discretion of the court. The discretion is a very wide one. It will be a matter of fact whether the company should be wound up or not under this rule. Each case will depend on its own circumstances: Loch v John Blackwood Ltd [1924] AC 783 and Re Bleriot Manufacturing Air Craft Co (1916) 32 TLR 253. There must be a sound induction of all the facts to justify the exercise of the discretion. There is no general rule for this (Davis & Co Ltd v Brunswick (Australia) Ltd [1936] 1 All ER 299) and categories should be avoided (Re Straw Products Pty Ltd [1942] VLR 222, Ebrahimi v Westbourne Galleries Ltd [1973] AC 360), though illustrations assist.

20. Further, in **Abdirashid Mude Ulow v Hassan Omar Kassai** [2020] KEHC 10338 (KLR), in declining to wind up a company the Court stated as follows—

The court may subject the exercise of legal rights by various shareholders to equitable considerations of a personal culture arising between the shareholders in order to determine whether any of the actions are just or inequitable.

Several examples are cited to illustrate instances where it may be just and equitable to wind up a company. The instances include;

- a) Where the substratum has gone*
- b) Where it is impossible to carry on a company's business owing to internal disputes which have produced a state of deadlock*

c) Where directors withhold information from shareholders in circumstances which give rise to the suspicion that they are attempting to buy their share at an undervalue...

21. In the event that it becomes apparent to the Court that there exist grounds to warrant issuance of an order to wind up a company, the said order may still not be granted, if there is an alternative remedy available to the parties in the petition.
22. The company in issue has only two Shareholders, the petitioner and the respondent, who each hold equal shares and serve as its Directors. It is not disputed that since the company's incorporation, the petitioner has been in charge of its daily operations/management, whereas the respondent's role was limited to signing of cheques as a mandated signatory. The petitioner contended that the respondent has always been disinterested in the daily running and/or operations of the company despite his constant pleas for him to take part in the same. He averred that relations between the two Directors have broken down, with the respondent refusing to participate in key company functions or authorize critical payments, including staff salaries, unless the petitioner buys out his shares, thereby, disrupting the company's operations and frustrating its daily management. Further, that communication between the said Directors is completely severed, resulting in operational paralysis.
23. It was stated by the petitioner that despite efforts to resolve conflicts, the respondent remains uncooperative and indifferent to the company's welfare. The petitioner asserted that the company has reached a state of management deadlock and declining commercial viability, hence liquidation is the most just and equitable solution.

24. The respondent's response largely revolved around the parcel of land situate in Thindigua, Kiambu County that had been acquired by the company. The respondent averred that the said property was transferred to the interested party following a Board resolution by the company. He seeks to have this Court compel the petitioner to sign the transfer documents. He accused the petitioner of registering a new company, One Pulse Kenya, on 12th February 2021, and diverting the company's business and goodwill for personal gain, and converting uncharged company assets for personal use, causing the company losses.
25. The interested party on the other hand in its replying affidavit asserted that the Thindigua property should be transferred to it, having purchased it from the company on the verge of it being auctioned, before any liquidation proceedings can proceed. He averred that despite a Board resolution confirming the sale, the petitioner has refused to honour it, thus undermining the Agreement. The interested party accused the petitioner of using the liquidation petition to oppress the interested party and avoid the property Sale Agreement, claiming that liquidation before transfer would cause irreparable financial loss to the interested party.
26. From the foregoing analysis, this Court notes that there are indeed disputes between the petitioner and the respondent in respect to the company. This is further amplified by the fact that the dispute between the petitioner and the respondent could not be resolved even after they were subjected to Court annexed mediation. The respondent does not deny not having authorized employee salaries for the month of November 2019 but states that he had a legitimate reason for doing so. He does not also deny that he informed the petitioner to buy his shares as a condition for him to sign the cheque for

purposes of payment of staff salaries for the month of November 2019. He however states that he has since authorized the said payment by signing the requisite cheques, thus the issue is settled. It is however noteworthy that this was done after institution of the instant petition and was as a result of Court mandated mediation that the petitioner and the respondent were subjected to.

27. The email communication referred to by the petitioner between the petitioner and the respondent has not been denied and/or contested by the respondent. Further, it is clear from the pleadings filed that neither the petitioner nor the respondent has expressed interest in actively running the company or buying out the other's shares. The respondent and the interested party have heavily relied on the Board resolution of 1st October 2019. The petitioner averred that the respondent failed to perform his part of the resolution despite pleas from him, thus necessitating the filing of these proceedings. It is however evident that it is not in contest that the said resolution acknowledged liquidation of the company as a potential solution after settling all the company's liabilities. Both Shareholders seemingly anticipated this as a possible resolution.
28. In the premise, this Court finds that the relationship between the petitioner and the respondent is irreparable, making effective collaboration impossible. Further, from the Ruling delivered on 7th July 2020, the Court highlighted available remedies, such as arbitration or share transfer under Article 9 of the Articles of Association, which should have been explored before liquidation. The parties herein have however not attempted to take advantage of the said remedies. It is as such evident that the said remedies are not practical under the current circumstances.

29. The interested party's case is on the ownership of the Thindigua property. I agree with Counsel for the petitioner that this Court is not clothed with the jurisdiction to determine whether or not the said property was actually sold to the interested party and if so, whether the interested party fully paid for its purchase price, making it being entitled to its ownership. This will be the preserve of the Liquidator appointed to oversee the liquidation of the company in the event that a winding up order is granted. This issue could also have been determined by the Commercial Court, if the interested party had instituted a suit against the company, but not in this forum (insolvency proceedings).
30. Based on the evidence adduced and the submissions by Counsel for the parties, this Court finds that there is a deadlock and/or stalemate in the running of the company's affairs. In the premise, the petitioner has made out a case for this Court to issue an order liquidating the company on grounds that it is just and equitable to do so. This is more so practical, considering the fact that the petitioner has registered a new company that carries on similar business to that of the company herein.
31. The upshot is that the instant petition is merited. It is hereby allowed in the following terms -
- i) Motion Pictures Limited is hereby liquidated under the provisions of the Insolvency Act;**
 - ii) The Official Receiver (or a person nominated by the Official Receiver) is hereby appointed as the Liquidator of the assets of Motion Pictures Limited; and**

iii) Costs of the Insolvency Petition are hereby awarded to the petitioner and shall be borne out of the assets of Motion Pictures Limited.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 28th day of November 2025. Judgment delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:

Mr. Akach for the petitioner

No appearance for the respondent

Ms Wangui h/b for Mrs Kariuki for the interested party

Ms B. Wokabi – Court Assistant.