



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: F. MUGAMBI, J**  
**INSOLVENCY PETITION NO. E068 OF 2023**

**BETWEEN**

**TERIYAKI JAPAN LIMITED .....**  
**PETITIONER**

**VERSUS**

**SOROYA INVESTMENTS LIMITED .....**  
**RESPONDENT**

**JUDGMENT**

**Introduction and Background**

**1.** By a Petition dated 28<sup>th</sup> March 2025, the Petitioner seeks orders for the liquidation of the Respondent, Soroya Investments Limited, and the appointment of the official receiver as provisional liquidator. The Petitioner further prays that the provisional liquidator be allowed to dispose of the Respondent's assets to satisfy the debt of Kshs.13,085,669.61 together with interest at 6% per annum from 15<sup>th</sup> December 2021 until payment in full. The Petition is supported by

affidavits sworn on 28<sup>th</sup> March 2025 and 4<sup>th</sup> February 2025 by *John Baptista Gatuthu Kaniaru*.

2. The Petitioner avers that the Respondent received monies as deposit amounting to Kshs.10,000,000/= which, together with accrued interest, totals Kshs.13,085,669.61. Despite repeated demands, the Respondent has failed to settle the debt. The Petitioner further states that a statutory demand was duly served and that in **Insolvency Notice Number E088 of 2021**, this Court declined to set aside the demand. On this basis, the Petitioner contends that the Respondent is unable to pay its debts within the meaning of **Section 384 of the Insolvency Act, 2015**.
3. The Respondent opposed the Petition through an affidavit sworn on 30<sup>th</sup> April 2024 by *Naveed Soroya*. They confirm receipt of the amount paid to them as goodwill and argue that the dispute arises from a contractual arrangement relating to leased premises. The Respondent further states that they have lodged an appeal against the ruling declining to set aside the statutory demand, which appeal is pending before the Court of Appeal. They invoke **Section 6 of the Civil Procedure Act**, arguing

that this Court is barred from entertaining the Petition as the issues are substantially before the appellate court.

### **Analysis and determination**

4. I have carefully reviewed the Petition together with the supporting affidavits, the response, and the written submissions of the parties. The central question for determination is whether, in view of the pending appeal, this Court ought to proceed to hear and adjudicate upon the present Petition, which has been instituted by a creditor under **Section 425(b) of the Insolvency Act**. Should the Court answer that question in the affirmative, the further issue is whether the Petition is meritorious.
5. Regarding the preliminary issue of the pending appeal, it is settled law that the mere lodging of an appeal does not, in itself, operate as a stay of proceedings or execution. For an appeal to suspend the jurisdiction of this Court, the Respondent must obtain and present a formal

order of stay pursuant to **Rule 5(2)(b) of the Court of Appeal Rules** or under **Order 42 Rule 6 of the Civil Procedure Rules**. In the present matter, no such order has been produced.

6. While the record shows that a Memorandum of Appeal was filed on 9<sup>th</sup> September 2022 and directions were subsequently issued by the Court of Appeal on 15<sup>th</sup> December 2022, no evidence has been tendered as to the progress or outcome of that appeal, which has remained dormant for a period of three years. In these circumstances, and absent any subsisting order of stay, this Court retains jurisdiction to proceed with and determine the Petition.
7. The Respondent has sought to rely on **Section 6 of the Civil Procedure Act**, which bars a court from proceeding with a matter in which the issues are directly and substantially in issue in a previously instituted suit between the same parties. However, the scope of **Section 6** must be properly appreciated. The appeal before the Court of Appeal concerns the validity of the statutory demand. That issue has already been conclusively

determined by this Court, and unless and until overturned, it remains binding.

8. The Petition now before this Court is not a re-litigation of the statutory demand; rather, it is a distinct proceeding under **Section 425(b) of the Insolvency Act**, premised on the Respondent's inability to pay an established debt.
9. That said, I now move into the substance of the Petition. **Section 424(e) of the Insolvency Act** provides that a company may be liquidated where it is unable to pay its debts. The Act itself sets out the framework for determining such inability, so that there are objective statutory criteria rather than subjective impressions of financial distress. One of the cardinal indicators of inability to pay is the existence of a statutory demand that has neither been set aside nor satisfied within the prescribed period.
10. Under **Section 384(1)(a)**, a company is deemed unable to pay its debts if, after service of a statutory demand for a liquidated sum exceeding the insolvency threshold, the company fails to pay,

secure, or compound for the debt to the reasonable satisfaction of the creditor.

- 11.** In the present case, the statutory demand served upon the Respondent was challenged but ultimately upheld by this Court through a Ruling issued on 4<sup>th</sup> August 2022 in **Insolvency Notice No. E088 of 2021**. No order setting aside that demand has been produced, and the debt remains unpaid. The statutory presumption of insolvency therefore arises by operation of law.
- 12.** Accordingly, the Court is entitled to proceed on the basis that the Respondent is unable to pay its debts within the meaning of **Section 424(e)**, read together with **Section 384 of the Insolvency Act**. The burden then shifts to the Respondent to demonstrate solvency or to show that liquidation would be unjust or oppressive in the circumstances.
- 13.** The only evidence presented by the Respondents in this respect is a letter dated 13<sup>th</sup> May 2024 from PKF Kenya LLP which states in part:

***“We present below the statement of shareholder's fund extracted from 2022 (Audited) and 2023 (Unaudited. Audit is in progress) financial statements of the company for your reference.”***

- 14.** The letter purports to extract the statement of shareholders' funds from the company's financial statements for the years 2022 and 2023, indicating share capital of Kshs.250,000,000/= and retained earnings of Kshs.1,518,814,507/= as at 31<sup>st</sup> December 2023, culminating in shareholders' funds of Kshs.1,768,814,507/=.
- 15.** This evidence is materially deficient for several reasons. First, the figures for 2023 are expressly stated to be unaudited, with the audit *“in progress”*. Even the 2022 figures are presented in the letter as *“unaudited”*, which undermines their probative value. Even more, the letter is not accompanied by any financial statements, balance sheets, or cash flow statements that would enable the Court to assess the company's liquidity and ability to meet debts as they fall due. The figures

cannot therefore be treated as reliable proof of solvency as they do not present verifiable evidence of the company's financial position.

## **Disposition**

**16.** What then is the proper order to make in this case?

For the avoidance of doubt, I find the Amended Petition dated 28<sup>th</sup> March 2025 to be meritorious. However, in deference to the doctrine of hierarchy of Courts, it is not lost on me that a converse finding by the Court of Appeal on the appeal regarding the statutory demand could affect this decision. I therefore allow the Petition but direct that the order for liquidation shall be conditionally stayed for a period of thirty (30) days. Further orders are as follows:

- i. The Respondent is granted 30 days within which to obtain appropriate orders of stay from the Court of Appeal. Should the Respondent fail to secure such orders within the stipulated period, the provisional liquidator shall automatically stand appointed without further reference***

***to this Court by dint of Section 437 of the Insolvency Act.***

- ii. The powers of the said provisional liquidator shall be limited to disposing of the Company's assets to pay the outstanding amount of Kshs. 13,085,669.61, plus interest at 6% per annum from 15<sup>th</sup> December, 2021 till date of payment in full.***
- iii. The costs of the Petition are awarded to the Petitioner to be paid out of the Respondent's assets.***
- iv. These Orders shall be served upon the Official Receiver forthwith.***

**DATED, SIGNED AND DELIVERED IN NAIROBI  
THIS 30<sup>TH</sup> DAY OF JANUARY 2026.**

**F. MUGAMBI  
JUDGE**

**Delivered in presence of:**

Ms Muthoni for Mr Michuki for the petitioner

Mr Michuki for the petitioner

Mr Litoro for the respondent

Court Assistant: Lillian

Original file copy