

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E063 OF 2024

AND

IN THE MATTER OF ECP KENYA LIMITED

AND

**IN THE MATTER OF THE INSOLVENCY ACT(CHAPTER 53 OF THE
LAWS OF KENYA)**

JUDGMENT

Introduction & Background

1. *ECP Kenya Limited* (the "Company") has filed a petition dated 30th July 2024 seeking to liquidate itself and have the Official Receiver appointed as its liquidator. The petition is supported by the affidavits of the Company's director, Carolyn Margaret Campbell sworn on 30th July 2024 and 2nd July 2025 and it is opposed by the Kenya Revenue Authority ("KRA") through the replying affidavit of TIMOTHY NTHUKU, an officer within its International Tax Office Division, Large Tax Payers Office in the Domestic Taxes Department, sworn on 11th March 2025. The petition was

canvassed by way of written submissions which I have considered and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

2. The main issue for determination is whether the petition should be allowed and the Company liquidated with the Official Receiver being appointed as its liquidator. I do not think it is in dispute that under **section 425(1)(a)** of the ***Insolvency Act***, a company or its directors can apply to the court for liquidation of the company. Further, that under **section 424 (1)(e)** of the ***Insolvency Act***, a company may be liquidated by the court if it is unable to pay its debts. As submitted by the parties, **section 384(1) and (2)** of the ***Insolvency Act*** deals with circumstances under which a company is declared as being unable to pay its debts. It provides as follows:

(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.

(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).

3. In ***Matic General Contractors Limited v The Kenya Power and Lighting Company Limited [2001] LLR 4837 (CAK)*** Kwach J.,(as he was then) held that liquidation of a

company is a draconian step as it amounts of 'corporate execution' and that no order can be made until a debt is proved, where there is a *bonafide* dispute, as to its existence. It is also 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.

4. The Company's case is that it cannot be maintained as a going concern as there are no funds to sustain operations and that its directors resolved on 1st April 2024 that it should be liquidated. The Company avers that KRA issued tax demands of approximately Kshs. 2.5 billion which assessments were unsuccessfully challenged at the Tax Appeals Tribunal and the Company has appealed those decisions to this court. The Company's deponent stated that the Company's role was to collect and process data for its USA parent company but that this company is being dissolved. That the Company has not traded since 15th April 2023, and closed its operations in the country on 1st April 2024. It states that it has no assets or employees in Kenya and that the only potential liability is the aforementioned disputed tax bill currently before the Court.

5. In response, KRA deponed that the petition was filed in bad faith and is an attempt to defeat its efforts to collect the said taxes. KRA states that the Company owes taxes resulting from two disputes that have already been decided by the Tax Appeals Tribunal. The first is in respect of a tax demand of Kshs. 2,521,185,943.00 and the Tribunal dismissed the Company's appeal on 10th November 2023. That the Company appealed to this court but KRA claims the Company has shown a lack of urgency in resolving it. The other case is in respect of a tax demand of Kshs. 773,796,052.00 where the Tribunal also dismissed the appeal on 6th October 2023 and the Company appealed to the court but the appeal was dismissed on 13th December 2024 for want of prosecution.
6. KRA argued that the Company provided no proof to back up claims that the Company has no assets, no employees, no funds, or that the US parent company is actually in liquidation. KRA questions why the Company made no financial contingency for these massive tax liabilities before it decided to stop trading in April 2023 and points out that this petition was filed while tax disputes were still pending in court and while the Company was

claiming to want an Alternative Dispute Resolution process, which KRA says shows bad faith. For these reasons, KRA urges that the petition be dismissed or alternatively that the court issues appropriate orders that protect its collection of the outstanding tax liabilities.

7. I have gone through the parties' rival arguments in their pleadings and submissions and I come to the conclusion that the Company has made out a credible, good-faith case that it is unable to pay its debts, and liquidation appears inevitable. I say so for a number of reasons. First, under **section 384(1)(b)**, a company is unable to pay its debt if a judgment remains unsatisfied. This court dismissed the Company's appeal on the Kshs. 773,796,052.00 tax debt and this judgment remains unpaid. An unsatisfied court judgment is a clear statutory ground for liquidation. Second, under **section 384(2)**, a company is also unable to pay its debts 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. Whereas KRA stated that no evidence was provided to demonstrate that the Company had no assets, the Company annexed a financial statement for the year 2023 showing zero assets, Kshs.

3.292,416,896.00 liabilities, and massive losses with auditors opining that the Company was not a going concern. KRA did not dispute the veracity or correctness of this financial statement and I find that the Company's evidence is compelling as to its dire financial position.

8. Third, the Company stated that it ceased trading on 15th April 2023 and that it has no revenue, no employees and no office and that it cannot pay debts as they fall due. A company with no operations or income is *prima facie* unable to pay debts and I find that the financial statement confirms this position. Fourth, I also note that the Company has complied with the procedural requirements for a liquidation petition by filing the requisite *Form 32* on the Statement of its Affairs, *Form 32D* verifying affidavit accompanying the petition, Certificate of Compliance from the Official Receiver and that it advertised the petition in the newspaper. Lastly, I note that the Company filed this petition 15 months after ceasing trade, just over two years after the tax assessments and voluntarily exposed its books to the Official Receiver. Further, no fraud has been alleged by KRA or any other creditor. All these in my view are a demonstration of good faith

and I find that a failed business seeking legal closure is not prima facie abuse as alleged by KRA.

9. In summary, it is my finding that the company has an unsatisfied court judgment against it and that alone is a statutory ground for liquidation under **section 384(1)(b)**, regardless of any other disputed debt. The Company is balance-sheet insolvent and appears to be commercially dead and continuing to force it to exist serves no creditor's interest. Whereas KRA in its submissions suggested administration as an alternative to liquidation under **section 522**, the Company successfully rebuts this by stating that KRA never filed a formal application or cross-petition for it. In any case, administration is meant to rescue a viable business. The Company has not traded for over two years, has no staff, and no assets and I find that administration would be a futile expense.

Conclusion and Disposition

10. In the foregoing, I now issue the following final orders:

1) The petition dated 30th July 2024 is allowed.

**2) A Liquidation Order is hereby issued against the
Company, ECP KENYA LIMITED.**

3) The Official Receiver is hereby appointed the Interim Liquidator of the Company, ECP KENYA LIMITED.

4) There is no order as to costs.

**DATED SIGNED AND DELIVERED virtually at NAIROBI this
8th DAY of MAY 2026**

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Nkonge for the Petitioner
2. Ms. Almadi for the Creditor-KRA
3. Amos- Court Assistant