Mitchell Cotts Freight Kenya Limited v Paleah Stores Limited (Insolvency Petition E011 of 2024) [2025] KEHC 9455 (KLR) (27 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9455 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

INSOLVENCY PETITION E011 OF 2024

J NGAAH, J

JUNE 27, 2025

BETWEEN

MITCHELL COTTS FREIGHT KENYA LIMITED ..... PETITIONER

AND

PALEAH STORES LIMITED ..... RESPONDENT

RULING

1. By a petition dated 3 July 2024, the petitioner has sought the respondent company to be liquidated by this Honourable Court under the provisions of the *Insolvency Act* No. 18 of 2015 and the Official Receiver be appointed as the liquidator. The only other substantive prayer is that the costs of the petition be granted to the petitioner and be paid out of the assets of the respondent company.

2. The respondent has been described as a limited liability company duly incorporated within the Republic of Kenya on 31 July 2001 under the provisions of the *Companies Act*, cap. 486. Its registered office is at Wanguru town in Mwea, Kirinyaga County. It has the nominal capital Kshs. 100,000/- divided into shares of Kshs. 1,000 /- each. The amount of the capital paid up or credited as paid up is Kshs. 100,000/-

3. For the past one year preceding the instant petition, the company has carried on business in Wanguru town in Mwea, Kirinyaga County within the jurisdiction of this Honourable court.

4. The petitioner has pleaded that the respondent company is indebted to the petitioner to the tune of USD 94,202.68. This debt arises out of cargo and logistic services given by the petitioner to the respondent. The total cost for these services is said to have been USD 208,682.33 which amount was due as at 13 December 2018.

5. After reconciliation of accounts, parties are said to have agreed on a payment plan but which the respondent failed to honour, despite several demands by the petitioner for payment of the outstanding

amount.The petitioner, consequently, served a statutory demand upon the Company for payment of the debt of USD 208,682.33 on the 15 July 2020.

6. In response to the statutory demand, the respondent filed an application dated 4 August, 2020 seeking to set aside the demand. The application was dismissed by Chepkwony, J. on 26 July 2021. Upon dismissal of the application, the respondent filed another application dated 25August, 2021 for, inter alia, stay of proceedings pending hearing and determination of an intended appeal.

7. On 20 June 2022, Sewe, J. delivered a ruling on the application according to which the respondent was ordered to make concrete proposals for payment of the undisputed amount. Parties were also to address the court on conditions of stay of further proceedings.

8. The amount of USD 80,000 was confirmed to have been paid and, therefore, the outstanding amount was USD 128,682.33, The respondent then made several proposals as regards security deposit for the undisputed amount of USD 128,682.33, including depositing a copy of certificate of title in court for land parcel number Mwea/Tebere/ Bl 4299 registered in the name of one Patrick Njiru Kuria who is the director and majority shareholder of the respondent company.

9. The petitioner rejected the security and insisted on the monetary security of the amount of USD 128,682.33. Later, the respondent insisted that the amount due and owing was USD 34,479.65. The court then directed that the respondent to pay the sum of USD 34,479.65 on or before 30 July 2023. Directions were to be given on the disputed balance of USD 94,202.68. On 13 June 2023, Wangari, J. ordered the respondent to provide a bank guarantee and/or an insurance bond equivalent to the amount claimed by the petitioner within 30 days.

10. The respondent did not abide by the said orders and, consequently, on 23 October, 2023, the stay orders granted to the respondent vide its application dated 25 August, 2021 were discharged forthwith and the application dismissed with costs to the petitioner. The petitioner was then allowed to initiate insolvency proceedings in default of payment of the entire amount of USD 94,202.68. 8.

11. According to the petitioner, as at 23 October, 2023, the respondent was justly indebted to the petitioner to the tune of Kshs. USD 94,202.68. It is urged that the petitioner does not, nor does any person on its behalf, hold any security on the respondent's assets for payment of the debt amount. The respondent, it is urged, is insolvent and, therefore, unable to pay its debts as and when the same fall due or that it can only pay if compelled through orders of this Honourable court hence this Petition.

12. The amount owed to the petitioner by the company is within the prescribed insolvency level in accordance with the *Insolvency Act* No. 18 of 2015.

13. The respondent, it is contended, continues to carry on its business in Kenya and that, it is only fair, just and equitable that the respondent be liquidated in order to secure the interests of the petitioner. Accordingly, it is urged, this Honourable court should appoint a Liquidator to liquidate the assets of the Company as the court may direct.

14. The respondent filed an application 22 August 2024 seeking to strike out the petition. According to the affidavit filed in support of the application, the debt is disputed and that the respondent does not owe the petitioner any money. It is this application that is the subject of this ruling.

15. As far as the respondent is concerned, after the payment of USD 80,000 was acknowledged, the only outstanding amount after the reconciliation of accounts was USD 34,479.65 which was also eventually paid. The sum of USD 94,202.68 is disputed, a fact that has been admitted by the petitioner.

16. As both parties agree, the precursor to this petition is a statutory demand dated 18 June 2020 according to which the petitioner had sought to recover the sum of USD 208,682.33. The demand was

vehemently contested by the respondent, more or less, on the same grounds upon which the instant application is based.

17. In a ruling rendered by Chepkwony, J on an application dated 4 August 2020, in High Court Insolvency Cause No. 3 of 2020, filed by the respondent to set aside the statutory demand, the learned judge established, inter alia, that:

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> "31. The creditor stated that it offered handling logistic services worth USD 208,682.33. The debtor on the other hand avers that it paid the creditor USD 87,574.00 0n 4.05.2018 and was issued with a credit memo. Further the debtor has annexed prove of payment of a sum of USD 80,000/= paid in 2019which shows that the debt owed to the creditor has fully been settled.
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> The debtor prays that the debtor be compelled to pay the uncontested sum of USD 128, 682.33 pending the determination of this application."

18. The learned judge further held:

> "35. I have considered the above cited authorities and the respective parties' cases in this it is evident that there has been an overstatement of the amount claimed in the statutory demand since the creditor has refused to acknowledge the amount of USD 80,000/=paid to it by the debtor in instalments on 24.01.2019, 23.02.2019 and 3.06.2019."

19. Ultimately, however, the respondent's application was dismissed and, in doing so, the court held:

> "39. Consequently, I would not set aside the statutory demand because of the allegedly overstated amount as it is was also not shown to my satisfaction that there was an overstatement or that the amount was disputed on substantial grounds."

20. Apparently, building upon Chepkwony, J.'s decision, on 23 October 2024, Wangari,J. ordered insolvency proceedings be taken if the respondent could not provide a "bank guarantee or/insurance bond within 14 days less the overpaid amount."

21. It is against this background that the instant petition has been instituted. Of importance to note is the fact that after the learned judges considered the respondents argument on whether the debt was disputed or not they, declined to set aside the statutory demand and, more importantly, gave the petitioner the green light to proceed and initiate the instant petition.

22. As I have noted, the challenge to the petition is on the same grounds as the grounds upon which the application to set aside the statutory demand was made. That being the case, if I was to allow the application and strike out the petition on those same grounds which my learned sisters considered and allowed the petitioner to proceed in its tracks and file the instant petition, I would be more or less sitting on appeal on the decisions of judges of coordinate jurisdiction. This I cannot do.

23. Out of deference to the previous rulings or orders made in respect of the question of insolvency proceedings, I am inclined to dismiss the respondent's application. It is for the same reason that it is unnecessary for me at this stage to apply my mind to the question whether indeed the debt out of which these insolvency proceedings have been instituted is disputed.

24. That notwithstanding, section 427(1) of the *Insolvency Act* suggests that the institution of a liquidation application such as the one before court is not an end in itself. The petitioner has to satisfy the court and discharge the burden of persuading the court that it is entitled to the liquidation order. This section reads as follows:

> 427. Powers of Court on hearing of liquidation application
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> (1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate—
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> (a) an order dismissing the application;
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> (b) an order adjourning the hearing, conditionally or unconditionally;
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> (c) an interim liquidation order; or
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> (d) any other order that, in its opinion, the circumstances of the case require.
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> (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.
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> (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—
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> (a) that the applicants are entitled to relief either by liquidating the company or by some other means; and
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> (b) that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated.
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> (4) Subsection (3) does not apply if the Court is also of the opinion that—
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> (a) some other remedy is available to the applicants; and
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> (b) they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy.

25. Thus, upon hearing the petition, the court has a discretion to make a liquidation order, or dismiss the petition. The court may also make any other order that, in its opinion, is mete and just, among other orders that it is entitled to make under this provision of the law. What this means is that an application for liquidation does not, ipso facto, sound a death knell to a debtor's quest to challenge the validity of the petition. A debtor still has a window to persuade the court to make any of the orders under section 427 (1) of the Act notwithstanding a liquidation petition has been filed.

26. That said, to avoid the possibility of making contradictory orders in the same matter and so that I am not constrained to determine the petition in any particular manner, in the wake of the previous order on the institution of these proceedings, I direct that, going forward, this matter proceed before Wangari, J. Subject to this direction, and for reasons I have given, the respondent's application is dismissed. Costs will abide the outcome of the petition.

SIGNED, DATED AND DELIVERED ON 27 JUNE 2025.

NGAAH JAIRUS

JUDGE