



**Cabanas Highway Limited v Comroad Construction & Equipment Limited (Insolvency Petition E042 of 2023) [2025] KEHC 11683 (KLR) (Commercial and Tax) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11683 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**INSOLVENCY PETITION E042 OF 2023**

**MN MWANGI, J**

**JULY 31, 2025**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND**

**IN THE MATTER OF COMROAD CONSTRUCTION AND EQUIPMENT  
LIMITED**

**BETWEEN**

**CABANAS HIGHWAY LIMITED ..... PETITIONER**

**AND**

**COMROAD CONSTRUCTION & EQUIPMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner filed a Liquidation Petition dated 26<sup>th</sup> June 2022 against the respondent pursuant to the provisions of Section 425(1)(b) of the *Insolvency Act* seeking orders for the respondent to be liquidated under the *Insolvency Act*, for the Official Receiver, being an authorized Insolvency Practitioner, to be appointed as the Provisional Liquidator and for costs of the petition to be awarded to the petitioner and paid from the company's assets.
2. The petitioner's case is that it filed Milimani CMCC No. 4838 of 2014 against the respondent on 5<sup>th</sup> October 2021, in which suit judgment was entered in its favour for Kshs.1,746,000/= plus interest and costs, but the decree emanating therefrom remains unsatisfied, and attempts at execution have failed. The petitioner stated that as at the time of filing the petition herein, the respondent owed it Kshs.3,809,885.00, inclusive of interest and costs.
3. It was stated by the petitioner that a Statutory Demand was served upon the respondent on 14<sup>th</sup> September 2022 in HCCOMMIN No. E136 of 2022, requiring payment of the aforesaid sum within



- 21 days. The petitioner averred that the respondent attempted to have the said demand set aside but its application was dismissed on 19<sup>th</sup> May 2023. The petitioner stated that the respondent has failed to pay or make proposals to settle the said debt, it has no viable business operations and that it is unable to meet its financial obligations. It further stated that all avenues for recovery have been exhausted.
4. In opposition to the petition, the respondent filed a replying affidavit sworn on 16<sup>th</sup> November 2023 by Ms Christine Wangeci Wainaina, a Director of the respondent company. She averred that the respondent's current Directors being herself, Mr. Joseph Karuoro Claudio and Ms Joyce Muthoni Karuoro took over in July 2019, by which time the suit giving rise to this petition was already pending. She further averred that the said Directors have made unsuccessful efforts to get the former Directors of the respondent company being Messrs Selassie Waigwa Karuoro and Simon Karanja Ngugi to settle the debt. Ms Wainaina stated that there is a pending suit being HCCOMM No. E311 of 2022 between the respondent company and its former Directors regarding the responsibility for the decretal sum that forms the subject of these proceedings.
  5. She stated that as per a Memorandum of Understanding dated 3<sup>rd</sup> July 2019, the former Directors of the respondent company agreed to assume all liabilities incurred during their tenure. Ms Wainaina asserted that the respondent's current Directors are ready to pay Kshs.1,000,000/= upfront and settle the balance via consented terms. She averred that the respondent company risks significant financial loss from pending payments due from completed work, which could otherwise help in settling the debt. She urged this Court to dismiss the petition herein, asserting that it would cause undue prejudice given the Directors' lack of prior knowledge and their willingness to settle the debt herein.
  6. The petition was canvassed by way of written submissions. The petitioner's submissions were filed by the law firm of Abidha & Co. Advocates on 29<sup>th</sup> June 2024. The respondent neither filed written submissions nor made oral submissions in opposition to the instant petition, despite being given several opportunities to do so.
  7. Mr. Abidha, learned Counsel for the petitioner submitted that this petition was filed in accordance with Regulation 77B of the Insolvency (Amendment) Regulations, 2018. He stated that a statutory demand dated 14<sup>th</sup> September 2022 was served on the respondent based on a Judgment delivered in Milimani CMCC No. 4838 of 2014 and that the respondent's application to stay or vacate the said demand was dismissed, rendering the demand valid and enforceable. In support of the petition, Counsel cited the provisions of Sections 384 & 424(1)(e) of the *Insolvency Act* which provide that a company may be liquidated if it is unable to pay its debts. He stated that the respondent never appealed against the aforesaid Judgment and has consistently acknowledged the debt, but despite promises to pay, only Kshs.1,000,000/= was partially paid on 25<sup>th</sup> November 2023.
  8. Mr. Abidha relied on the case of *Mutungu & another v Africa Merchant Assurance Company Limited* (Insolvency Cause 001 of 2021) [2022] KEHC 15438 (KLR) and submitted that the petitioner herein attempted to execute the aforesaid Judgment but recovered nothing. He contended that a significant portion of the decretal sum remains unpaid and continues to accrue interest. Counsel relied on the case of *Too (suing as the Administrator and /or Personal Representative of the Estate of Duncan Kiprono Mosonik - Deceased) v Africa Merchant Assurance Co. Ltd* (Insolvency Petition 1 of 2023) [2023] KEHC 23726 (KLR) and asserted that given the respondent's refusal and/or failure to settle the debt, it is just, equitable and fair to grant the liquidation orders being sought.



## Analysis And Determination.

9. Upon consideration of the instant petition and the affidavit in support thereof, the replying affidavit by the respondent and the written submissions by Counsel for the petitioner, the issue that arises for determination is whether a liquidation order should issue against the respondent.

10. Insolvency proceedings are provided for under Section 425(1)(b) of the *Insolvency Act*, 2015, which states as hereunder –

An application to the Court for the liquidation of a company may be made against any or all of the following-

- a. ...;
- b. a creditor or creditors (including any contingent or prospective creditor or creditors);...

11. The instances under which a Company may be liquidated by 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.

12. It is not in contest that the petitioner instituted Milimani CMCC No. 4838 of 2014 against the respondent, in which suit Judgment was entered on 5<sup>th</sup> October 2021 in favour of the petitioner herein, for Kshs.1,746,000.00 plus interest and costs. The decree emanating therefrom remains unsatisfied. The petitioner contends that it has since unsuccessfully attempted to execute the said Judgment against the respondent, and that on 14<sup>th</sup> September 2022 it caused a Statutory demand to be issued to the respondent in HCCOMMIN No. E136 of 2022, requiring payment of Kshs.3,652,747.00 being the decretal sum in Milimani CMCC No. 4838 of 2014. Subsequently, the respondent filed a Notice of Motion application dated 4<sup>th</sup> October 2022 seeking to set aside the said demand, but the application was dismissed vide a Ruling delivered on 19<sup>th</sup> May 2023.



13. The liquidation proceedings herein are based on grounds that the respondent is unable to pay its debts. Section 384 of the *Insolvency Act*, 2015, provides for the circumstances under which a company may be deemed unable to pay its debts as hereunder -
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. The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).
14. It is not disputed that the petitioner has a valid Judgment and decree against the respondent for Kshs.3,652,747.00. Further, the Judgment delivered in Milimani CMCC No. 4838 of 2014, the consequent decree thereto and the statutory demand served upon the respondent have not been stayed, set aside, varied and/or altered by a Court of competent jurisdiction, neither has the respondent complied with it. This Court appreciates the fact that since the institution of the instant insolvency proceedings, the respondent has paid Kshs.1,000,000/= towards payment and/or settlement of the decretal sum. But at the same time, it also acknowledges that there is still a substantial amount that is yet to be paid.
15. Upon perusal of the Court record, the parties herein have had a chance at negotiation. In its replying affidavit, the respondent has promised to make a proposal on how it intends to settle the balance of the decretal sum and even pay the entire balance of the decretal sum. However, as at the date of writing this Judgment, the decretal sum in Milimani CMCC No. 4838 of 2014 still remains unsatisfied, and the respondent does not deny being indebted to the petitioner as can be seen from its replying affidavit.
16. I am therefore satisfied that the petitioner has demonstrated on a balance of probability that the respondent is not only unable to pay its debts, but it is also indebted to the petitioner in the outstanding sum of Kshs.2,652,747.00 by virtue of a Judgment delivered in Milimani CMCC No. 4838 of 2014 on 5<sup>th</sup> October 2021 and the consequential decree arising therefrom.
17. The Court of Appeal in the case of *Pride inn Hotels and Investments Limited v Tropicana Hotels Limited* [2018] eKLR, Visram JA., reading the majority Judgment of the said Court stated as follows:

This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act*, which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options



under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.

18. In light of the above decision and the insolvency provisions I have cited in this Judgment, it is my finding that there is sufficient evidence that the respondent is unable to pay its debts.

19. I find that the petition herein is merited. It is hereby allowed in the following terms -

- i. That Comroad Construction & Equipment Limited is hereby declared insolvent and it is 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 respondent's properties; and
- iii. Costs of this petition shall be borne out of the respondent's assets.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI on this 31<sup>ST</sup> day of JULY**

**2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Ms Mutua holding brief for Mr. Abidha for the petitioner

No appearance for the respondent

Ms B. Wokabi – Court Assistant.

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