



**Momentum Credit Limited v Underwriting Africa Insurance and Reinsurance Brokers Limited (Insolvency Petition E051 of 2021) [2024] KEHC 3665 (KLR) (Commercial and Tax) (22 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3665 (KLR)

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

**INSOLVENCY PETITION E051 OF 2021**

**MN MWANGI, J**

**MARCH 22, 2024**

**IN THE MATTER OF UNDERWRITING AFRICA  
INSURANCE AND REINSURANCE BROKERS LIMITED**

**AND**

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

**AND**

**IN THE MATTER OF THE COMPANIES ACT, CAP 486 (NOW REPEALED)**

**BETWEEN**

**MOMENTUM CREDIT LIMITED.....CREDITOR/PETITIONER**

**AND**

**UNDERWRITING AFRICA INSURANCE AND REINSURANCE  
BROKERS LIMITED.....DEBTOR/RESPONDENT**

**BETWEEN**

**MOMENTUM CREDIT LIMITED ..... CREDITOR**

**AND**

**UNDERWRITING AFRICA INSURANCE AND REINSURANCE BROKERS  
LIMITED ..... DEBTOR**



## JUDGMENT

1. The Creditor presented a liquidation petition dated 27<sup>th</sup> October, 2021. Its claim is for the aggregated sum of Kshs 2,726,316.00 being the amount due and owing in respect to the consent judgment entered on 9<sup>th</sup> April, 2021 in Milimani CMCC No 4130 of 2019 - Momentum Credit Limited vs Underwriting Africa Insurance and Reinsurance Brokers Limited.
2. The Petitioner averred that it does not hold any security of the company's assets for the payment of the debt due. It stated that it issued a demand notice dated 6<sup>th</sup> July, 2021 to the company through its registered office in Nairobi, requiring that the amount of Kshs 2,726,316.00 to be paid within 21 days.
3. The Petitioner stated that despite the demand notice, the company has failed to pay the amounts due, and in the circumstances, it is only fair, just and equitable for this Court to grant it a liquidation order, for the liquidation of the company.
4. The Petitioner averred that the company has committed various bankruptcy offences within the last 2 years before the filing of this petition by the failure to pay or compound to the reasonable satisfaction of the Petitioner, the debt amount within 21 days after service of the demand notice.
5. The Petitioner seeks the following reliefs:
  - i. That the Company be liquidated by the Court under the provisions of the [Insolvency Act](#) 2015;
  - ii. Spent;
  - iii. That the Court appoints the Official Receiver as the Liquidator;
  - iv. That the costs of this petition be granted to the Petitioner and be paid out of the Company's assets; and
  - v. Such other order may be made in the premises as to the Court shall deem just.
6. In response to the petition the company swore a replying affidavit on 25<sup>th</sup> November, 2021, in which it averred that it had secured an investor who had authorised the disbursement of USD 6,900.00 towards the said judgment. The company stated that the spirit of the [Insolvency Act](#) is to rescue businesses and not the liquidation of the same.
7. The petition was canvassed by way of written submissions. The Petitioner filed written submissions dated 13<sup>th</sup> September, 2023. Mr. Mutegi, learned Counsel for the Petitioner submitted that the Petition for liquidation of the Company is well founded and in the best interest of the company and its creditors. He contended that there is no likelihood that the company will maintain itself as a going concern and return to profitability and meet its financial obligations to its creditors. He stated that dishonoured cheques as well as the unpaid debt to date are a testament to the said fact.
8. The Petitioner's Counsel urged this Court to find that it has adequately demonstrated that the company ought to be liquidated. He relied on the case in [Re Ukwala Supermarkets Limited](#) [2019] eKLR, where Kasango J., expressed the view that in any Petition brought for the purposes of liquidating a company, the Court has the discretion, once the Petitioner has established a right to bring a petition and has established the grounds alleged, to make or deny the order sought.
9. Mr. Mutegi submitted that the company has failed to repay the debt amount owed since the year 2019, and it has also failed to show any goodwill from its end or taken any steps to ensure that it pays off



its debts. He stated that the delay in settling the debt amount is most inordinate and the Court ought to take note of the same. He indicated that the company has not demonstrated that it is capable of maintaining itself as a going concern.

10. He expressed the view that the Petitioner will recover the debt amount if the company is liquidated by an order of this Court.
11. The debtor/respondent did not file any written submissions to support its opposition to the petition.

### **Analysis And Determination.**

12. I have considered the petition, the supporting and replying affidavits, and the Petitioner's submissions. The issue for determination is whether the company should be liquidated.
13. The company is indebted to the Petitioner and the debt is not disputed. The Petitioner has alleged that the company is insolvent and is not conducting business, and urged this Court to liquidate it as no evidence has been adduced that the company is in a position to pay the debt.
14. In response to the petition, the company averred that it had secured an investor who had authorised the disbursement of USD 6,900 towards the said judgment. The company urged this Court to consider reviving the company as opposed to liquidating the same.
15. Section 384 of the *Insolvency Act* provides the circumstances under which a company may be liquidated, when it is unable to pay its debts. The provisions state 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) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).”

16. Having considered the documents relied on by the parties herein, the company has not made any payments towards offsetting the debt after service of the statutory demand, despite having acknowledged the debt. The company has also not demonstrated that it is able to pay the debt to the petitioner. It has also not shown the efforts it has deployed in the repayment of the debt.



17. The Court in the case of *Prideinn Hotels and Investments Limited v Tropicana Hotels Limited* MSA CA Civil Appeal No 98 of 2017 [2018] eKLR held that-

(38) 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. It is evident that the debt as per the consent remains unpaid to date, and no adequate explanation has been adduced by the company for the failure to pay up. Section 427 of the *Insolvency Act* vests the High Court with the powers to deal with a liquidation petition. The said Section provides as follows-

“(1) On the hearing of a liquidation application, the Court may make such of the following orders as it considers appropriate—

- (a) an order dismissing the application;
- (b) an order adjourning the hearing, conditionally or unconditionally;
- (c) an interim liquidation order; or
- (d) any other order that, in its opinion, the circumstances of the case require.

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.

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—

- a. that the applicants are entitled to relief either by liquidating the company or by some other means; and
- b. that, in the absence of any other remedy, it would be just and equitable that the company should be liquidated.

4. Subsection (3) does not apply if the Court is also of the opinion that—

- a. some other remedy is available to the applicants; and
- b. they are acting unreasonably in seeking to have the company liquidated instead of pursuing that other remedy.”

19. Despite urging this Court to consider reviving the company as opposed to liquidating it, the company has failed to demonstrate the plans it has put in place to keep the company afloat. There is no



satisfactory explanation as to why the investor failed to inject the USD 6,900.00 into the company and honour the consent.

20. It then follows that the company has failed to demonstrate that it is able to generate funds to honour the debt, considering that the debt has been outstanding for a long time.
21. The upshot is that in the interest of justice, I find that the Petition is merited and I allow the same as prayed in the following terms:
  - i. The Company is hereby liquidated by this Court under the provisions of Section 384 as read with 427 of the *Insolvency Act*, 2015;
  - ii. The Official Receiver is hereby appointed as the Liquidator of the Company.
  - ii. i. The Petitioner will have the costs of the petition.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF MARCH, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Waruguru h/b for Mr. Mutegi for the creditor/petitioner

Ms Rutere h/b for Mr. Kai for the debtor/respondent

Ms B. Wokabi – Court Assistant.

