



MFT Fulfillment Center Limited v Vital Quest Limited (Insolvency Notice E052 of 2023) [2024] KEHC 9929 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9929 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E052 OF 2023**

A MABEYA, J

JULY 31, 2024

BETWEEN

MFT FULFILLMENT CENTER LIMITED DEBTOR

AND

VITAL QUEST LIMITED CREDITOR

RULING

1. Before Court is the application dated 23/5/2023. It was brought under section 384 of the *Insolvency Act* regulation 77B of the *Insolvency (Amendment) Regulations 2018*. It sought for the setting aside of the statutory demand dated 20/4/2022.
2. The application was premised on the grounds set out on the face of it and the supporting affidavit of Godwins Onyango Juma sworn on 23/5/2023. The applicant contended that the statutory demand for Kshs. 6,254,610/- was based on a disputed debt. That the parties executed a service level agreement on 3/12/2021 where the applicant was tasked with providing logistical support and delivery services to the respondent.
3. That it was a clause on the agreement that the respondent would pay the applicant a non-recurring fee for setting up a platform and retention of services. That on breach of contract, the respondent ought to have instituted a suit particularizing the breach. That the respondent had not terminated the contract and there was a contention on who breached the contract.
4. The respondent opposed the application through a replying affidavit of Richard Tsado sworn on 25/7/2023. He admitted that the parties had executed a service level agreement on 3/12/2021 but that there were terms of payment outlined in section 3(d) of the agreement. He contended that the applicant undertook to pay the respondent within 7 days the balance due after deduction of fees and



- commissions from the total sum. That the applicant breached the contract and that the applicant had admitted the debt.
5. Parties canvassed the application by way of written submissions. The applicant submitted that it had admitted to a debt of Kshs 1,262,067.80 and not the colossal amount demanded by the respondent. That the debt was disputed and the question of breach of contract can only be ascertained in a suit.
 6. I have carefully considered the parties contestations and the submissions on record. The main issue for determination is whether the applicant has made out a case for the striking out of the Statutory Demand dated 20/4/2022.
 7. The applicant seeks the striking out of the statutory demand on the grounds that the debt is disputed as it arose from the breach of the service level agreement dated 3/12/2021.
 8. In *Universal Hardware Limited v African Safari Club Limited*, MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, the Court of Appeal held: -

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceeding on account of the company’s inability to pay its debts. The case law and scholarly writings are categorical that a creditor’s petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”
 9. And in *Re: Global Tours and Travels Limited* [2001] EA 195, the court observed that: -

“...in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.”
 10. In *East Africa Cables Limited v SBM Bank Limited* [2020] eKLR, the court quoted *Mann v Goldstein* [1968] 2 All ER 769, and stated: -

“The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide.”
 11. I have considered the record and it is clear that the of Service Level Agreement under clause 3 had financial provisions which spelled out the financial obligation of the client. The dispute between the parties is with respect to the breach of the said agreement. The respondent’s averment was that the debt was admitted and it produced several correspondences between the parties.
 12. On considering the said correspondence, it is clear that the amount therein add to only Kshs 1,262,067.80. However, the statutory demand herein was for Kshs 6,254,610/-.
 13. Based on the forgoing, the debt owed to the respondent is not clear. The evidence presented does not show that the amount demanded is the amount due. Further, there is the issue of who breached the contract. Clearly those are issues that warrant a normal suit.



14. Accordingly, the Court finds that the debtor has demonstrated that there is a genuine and substantial ground for disputing the debt. The dispute between the parties being for breach of contract could be best handled in a normal suit other than the insolvency proceedings.

15. In the premises, the Court finds merit in the application and the statutory demand dated 20/4/2022 is hereby set aside. The respondent will bear the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2024.

A. MABEYA, FCI Arb

JUDGE

