



**Marula Estate Limited v Tamani Construction Co Ltd (Insolvency
Petition E040 of 2023) [2024] KEHC 9826 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
INSOLVENCY PETITION E040 OF 2023**

FG MUGAMBI, J

JULY 26, 2024

BETWEEN

MARULA ESTATE LIMITED PETITIONER

AND

TAMANI CONSTRUCTION CO LTD RESPONDENT

RULING

Background

1. The respondent filed the present petition dated 20/6/2023 seeking to have the applicant liquidated over an unsettled decree of Kshs. 104,491,386/=. The decree was obtained in Naivasha HCC No. E009 of 2021. In the petition the respondent contends that a statutory demand was served on the applicant who has not made good the amount and that the statutory 21 days have since lapsed.
2. Arising from the petition the applicant filed the application dated 23/6/2023 seeking to stay the petition filed herein pending the hearing and determination of this application and the hearing of an application dated 30/5/2023 seeking to set aside the decree in Naivasha HCCC No. E009 of 2021.
3. The applicant contends that it has applied set aside the consent judgment in Naivasha HCCC No. E009 of 2021 which application is pending at the High Court in Naivasha. That if the decree is set aside then the insolvency proceedings will be nullity. The applicant further contends that the decree dated 16/5/2022 which the petitioner is relying on in this petition was found to be defective and incapable being executed by this court (Grace Nzioka, J) in a ruling delivered on 29/2/2022.
4. The application is opposed by the replying affidavit of Benjamin Wainaina, Counsel for the respondent, sworn on 14/7/2023. The respondent confirms that the parties entered into a consent which was adopted by the court on 16/5/2022. In part performance of the consent judgment the applicant made part payment of the outstanding amount. That so far, the applicant had paid Kshs. 10,200,000/= towards the total debt. The respondent notes that the applicant had not applied to set



aside the statutory demand and that the application for setting aside the judgment is not a ground for staying the petition. The respondent confirms that the respondent had in the case between the parties admitted the debt.

Analysis and determination

5. Under the *Insolvency Act* a liquidation petition can be brought against a company that is insolvent or unable to pay its debts. One of the indicators of insolvency under section 384(1)(b) of the Act is where 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.
6. Where a creditor is unable to enforce a judgment against a debtor, this may be a sign that the debtor is unable to pay its debt. The consent judgment dated 16/5/2022 against the applicant is not denied. The applicant has equally, in affidavits filed in Naivasha HCCC No. E009 of 2021 & Naivasha HCC Misc No. E059 of 2022 unequivocally admitted and acknowledged its indebtedness to the petitioner and has made partial payments of the debt. The evidence of such part payments has also been provided to the court.
7. In light of these observations, it is doubtful that the applicant's case to set aside the interlocutory judgment will be able to meet the threshold of a prima facie case with chances of success. In any case, as at the time of this ruling it has not been confirmed to this court that the application has been allowed. Even if I were wrong on this account, the creditor may still choose to pursue the liquidation based on any other ground available by dint of section 384(1)(b) of the *Insolvency Act*.
8. The applicant further argues that the respondent should have pursued liquidation as a last option. In my view, liquidation proceedings are just one of the modes of execution. It does not have to be the last option for the respondent, as suggested by the applicant, so long as all the processes and requirements under the *Insolvency Act* have been satisfied.
9. In any case, the applicant had an opportunity to prove its solvency by challenging the statutory demand of 11/5/2023. A statutory demand is a precursor to insolvency proceedings by which a creditor sets out to prove the debtor's inability to settle their debt and forms the basis for commencement of insolvency proceedings by way of a petition. It is not clear why the applicant did not apply to set it aside. The application before the court is not for setting aside a statutory demand as alluded to in the applicant's submissions.
10. It has been stated time and again that submissions are not pleadings and cannot purport to introduce new matters that have not been pleaded. The prayers in the application are clear that the same seeks to stay the proceedings herein pending the determination of the application to set aside the interlocutory judgment.
11. Having not applied to set aside the statutory demand within the time frame given under the Act, no justification has been made for seeking to stay the proceedings at this point. The applicant still has an opportunity to present evidence in their defense against the liquidation petition to demonstrate why the petition should not be allowed.

Disposition

12. Accordingly, the application dated 23/6/2023 is devoid of merit. It is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY, 2024.

F. MUGAMBI



JUDGE

