



**AGBS Trading NV v Aluken Trading Limited (Commercial Case E092 of 2023)
[2024] KEHC 10258 (KLR) (Commercial and Tax) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10258 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E092 OF 2023**

PM MULWA, J

AUGUST 15, 2024

BETWEEN

AGBS TRADING NV DEBTOR

AND

ALUKEN TRADING LIMITED CREDITOR

RULING

1. This ruling determines the Debtor's application dated 18th August 2023 seeking to set aside the Creditor's statutory demand filed on 26th July 2023.
2. The application is premised on the grounds that the statutory notice is premature as the Creditor has not exhausted all other remedies and is acting unreasonably in seeking to have the company liquidated instead of pursuing other remedies.
3. In opposing the application, the Creditor filed a replying affidavit sworn by its regional debt collector, Sharon Maina on 5th September 2023. The Creditor's position is that the application is premature as it seeks the setting aside of the statutory demand for the sole reason that it had not been signed and sealed by the time the application was filed; that the application ought to be dismissed as it does not challenge the legal validity of the statutory demand as no defect has been pleaded or proved by way of affidavit evidence; that the Debtor has admitted to the existence of the debt and that the application is incomplete, without legal basis, frivolous and vexatious.
4. The application was disposed of by way of written submissions. The Debtor's submissions are dated 5th December 2023 while the Creditor's submissions are dated 29th November 2023.



Analysis and determination

5. I have carefully considered the pleadings and submissions by the respective parties. The issues for determination are whether the application is defective as it has no supporting affidavit and whether the Creditor has made a case for setting aside the statutory demand.
6. As to whether the application is defective as it has no supporting affidavit, the Court in *Skair Associates Architects v Evangelical Lutheran church of Kenya & 4others* [2015] eKLR, held thus:

“...it is not all motions that can be supported by an affidavit...An affidavit is, however, necessary were the motion is to be supported by evidence...there are clear instances when such affidavit evidence is not required.”
7. In this matter, the basis for the Debtor’s application is that the statutory notice is premature as the Creditor has not exhausted all other remedies and that the Creditor is seeking to have the company liquidated instead of pursuing other remedies. In my understanding, these are not pure points of law, rather they are factual and require the Court to consider evidence to determine whether the Creditor has made a case for setting aside the statutory demand.
8. Regulation 17(6) of the *Insolvency Regulations* requires a Debtor to establish the following to show the Court that there is a basis for setting aside the statutory demand:

“The Court may grant the application if:

 - a. The debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
 - b. The debt is disputed on grounds which appear to the Court to be substantial;
 - c. It appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt, or;
 - d. The Court is satisfied, on other grounds, that the demand ought to be set aside.”
9. The Court of Appeal in *Universal Hardware Limited v African Safari Club Limited* (MSA CA Civil Appeal No. 209 of 2007) [2013] eKLR, aptly stated that:-

“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 the instant case, the Debtor has merely stated that it disputes the debt without a supporting affidavit to demonstrate reasonable grounds. Therefore, I find that the application is defective as it has no supporting affidavit.
11. Accordingly, the Debtor’s application dated August 18, 2023 is hereby struck out with costs to the Creditor.

Orders accordingly.



RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF AUGUST 2024.

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P. MULWA

JUDGE

