



**Gheewala v Gheewala (Insolvency Cause E153 of 2019)
[2024] KEHC 14819 (KLR) (Commercial and Tax) (27 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E153 OF 2019
A MABEYA, J
NOVEMBER 27, 2024**

BETWEEN

ELESHKUMAR CHANDRAKANT GHEEWALA DEBTOR

AND

MAMTA GHEEWALA CREDITOR

RULING

1. The application dated 6/12/2023 is by the debtor seeking that the statutory demand dated 17/11/2021 be set aside. It was brought under the provisions of Order 51 rule 1 and 2 of the [Civil Procedure Code](#), Regulations 16 and 17 of the [Insolvency Regulations](#) and sections 1A, 1B and 3A of the [Civil Procedure Act](#).
2. It is also supported by the affidavit of the debtor. The grounds therefor were that the parties entered into a Mediation Settlement Agreement which was adopted as an order of the court in High Court Succession Cause No 264 of 1994.
3. That the parties are brother and sister and are also beneficiaries of the estate of the late Chandrakant Shamjibhai Gheewala which was subject to a Succession case. That vide the said mediation agreement, an order was made that the applicant do pay the respondent USD 200,000 by 31/7/2020. That it was expected that by that time, the grant would have been confirmed and the applicant would have realized his share of the estate and settled the amount.
4. That the succession case is still pending and the respondent has served him with statutory demand claiming USD 276,077 which action is done in bad faith, is an abuse of court process and is malicious.



5. That the applicant can be able to settle the debt by disposing off his assets in the estate or through an equivalent in his entitlement in Cassava Plantations Limited which he proposed to vest to the respondent but was rejected .
6. That the amount in the statutory demand is disputed since the court order did not provide for interest on the agreed amount of USD 200,000/= . That the statutory demand is frivolous and is fatally defective and that it is meant to put pressure on him. That he had put forward several proposals to the creditor.
7. The creditor opposed the application vide his replying affidavit. He alleged that the applicant was guilty of material nondisclosure and that the court was misled into issuing ex-parte stay orders. That the payment of the debt was not dependent on the confirmation of grant and the applicant had failed to disclose that he declined to sign consent for confirmation of grant thus the delay.
8. That in the month of July 2021, the applicant fraudulently sold off an asset of estate held in the name of Nyaku Ltd at Kshs 113 million and appropriated the funds. He further withdrew Kshs 83 million from the estate and that prior to the statutory demand he had been served with numerous demand letters.
9. That the he is a convicted contemnor in the Succession Cause following his failure to honour the terms of the Mediation Settlement Agreement. That Muchelule J had found that the amount was subject to interest. That the applicant has committed an act of bankruptcy and there is no ground for further delay in the pretext of the pending confirmation proceedings.
10. The application was canvassed through written submissions, the applicant submitted that it would be unjust for the demand notice to inform bankruptcy proceedings when he is able to meet his obligations. That the additional amount of US\$ 76,077/= is disputed and the respondent cannot purport to unilaterally award himself.
11. That the grounds for setting aside are not limited to Regulation 16 and 17 of the *Insolvency Regulations* and that the court has discretion to consider the ground of the application. The cases of *Peter Munga v Africa Seed Investment Fund LLC* 2017 eKLR and *Universal Hardware Ltd v African Safari Club* 2013 eKLR, were referred to in support of those submissions.
12. The main issue for determination is whether the Statutory Demand dated 17/11/2023 was properly issued and whether it should be set aside in the circumstances of this case.
13. Insolvency proceedings can be brought against a debtor who is unable to settle an outstanding amount and relevant notices have been issued.
14. Under the *Insolvency Act* provides inter alia that a creditor who has obtained a final decree or order serves a Statutory Demand on the debtor and the debtor fails to comply with the requirements of the demand within the time specified (7 seven days), the creditor is entitled to enforce it in insolvency proceedings.
15. In the present case, the parties executed a Mediation Settlement in High Court Succession Cause 264 of 1994 and the agreement was adopted as an order of the Court. It was a term of the order arising therefrom that the applicant would pay USD 200,000 to the each of beneficiaries of the estate including the respondent within 12 months from date of the order dated 16/10/2019.
16. The applicant was also found in contempt of court for failing to honour the terms of the order when it was clear that he had neglected to pay the amount. The decision of Muchelule J, as he then was, in his ruling delivered on 21/6/2021 is elaborate that compliance did not depend on confirmation of the grant and that parties did not contemplate payment beyond the agreed period.



17. The respondent in her response stated that applicant has never settled the amount despite demand notices being were issued. The applicant did not dispute this in his supplementary affidavit. Also, he did not deny the respondent’s contention that he had failed to disclose material facts before this Court and particularly that his actions have not being candid.
18. The view the court takes is that, the statutory demand was properly issued against the applicant in view of the evidence on record.
19. In *Flower City Limited v Poly tanks & Containers Kenya Limited* [2021] eKLR, it was held that: -
“The burden was for the debtor company to show a fairly arguable basis for setting aside the statutory demand. The court could set aside a statutory demand if it was satisfied that there was a genuine dispute about the existence of the debt; or if the court was satisfied that there was a genuine dispute about the amount of the debt, so much of that amount as the court was satisfied was not the subject of such a dispute.”
20. In *Re: Global Tours and Travels Limited* [2001] EA 195, it was held 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.”
21. The applicant alleged that interest had not been agreed. That in the circumstances the debt was disputed. Regulation 17(6) of the Regulations provides: -
“An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless-
a. the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and
b. the debtor makes that notification within the period specified”
22. In the present case, the applicant had not issued any notice under Regulation 17 (6) above and had also not taken steps to liquidate part of the amount.
23. The applicant offered his entitlement in Cassava Plantations Limited for further apportionment to the respondent in settlement of the debt. This proposal was declined by the respondent who contended that that was an attempt to vary the terms of the mediation agreement and decree of the court.
24. In my view, the issue of offering alternative mode of settlement of the amounts due would have been in the Succession Court where the agreement was adopted. This is not the forum for such proposals. It would amount to this Court reviewing the orders that resulted in the claim now being made against the applicant.
25. Lastly, the pendency of the succession proceedings does not prevent the creditor from filing insolvency proceedings. The creditor has liberty to pursue his debt using all necessary means. In *Ecobank Kenya*



Limited v Francis Tole Mwakidedi [2018] eKLR, the court held that a creditor is free to choose from which debtor and what method to use to recover a debt.

26. In view of the foregoing, I find that the application is without merit and I dismiss the same with costs. The orders of stay issued herein are set aside. The bankruptcy proceedings may be proceeded with in accordance with the law.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

