



**Wangombe v J.S. & Company Hardware Ltd (Insolvency Petition E022 of 2021)
[2022] KEHC 31 (KLR) (Commercial and Tax) (28 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 31 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E022 OF 2021
A MABEYA, J
JANUARY 28, 2022
IN THE MATTER OF THE INSOLVENCY ACT, 2015**

BETWEEN

STEPHEN KINUTHIA WANGOMBE APPLICANT

AND

J.S. & COMPANY HARDWARE LTD RESPONDENT

RULING

1. Before me is an application dated 24/5/2021. It was brought under section 1A, 1B & 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules* and regulation 16 & 17 of the Insolvency Regulations.
2. The application sought orders that the statutory demand dated 30/4/2021 and published in the local dailies on 4/5/2021 be set aside. It was supported by the affidavit of Stephen Kinuthia Wangombe, “the applicant” sworn on 24/5/2021.
3. The grounds were that the respondent issued a statutory demand dated 30/4/2021 and published in the Daily Nation newspaper on Tuesday 4/5/2021, demanding payment of Kshs. 2,829,081/= owed by the applicant.
4. It was alleged that the applicant was a stranger to the respondent’s claim as he had not entered into any commercial transaction with the respondent. That he had not procured, ordered or received any deliveries for supplies, equipment or materials from the respondent. In the premises, the statutory demand was defective.
5. That the 21day notice period under the demand was to lapse on 25/5/2021 hence the applicant was apprehensive that the respondent would illegally proceed with the bankruptcy proceedings against



him and obtain adverse orders. It was also contended that the widespread publication had adversely affected the applicant's reputation and standing in the business circles. That the demand was premised on outright misrepresentation of facts and was utterly false. The applicant therefore prayed that the Notice be set aside.

6. The respondent opposed the application through grounds of opposition dated 14/6/2021 and a replying affidavit sworn by Jatinder Singh Bamrah on 15/6/2021. He swore that he met the applicant and his wife at Karen Country Club where the parties patronize and play golf. That the applicant informed the respondent that he was building his home and would be taking supplies from the respondent. He proceeded to do so and made several cash purchases.
7. The deponent stated that the applicant requested for credit purchases which were approved based on the friendship relationship. However, the purchases were done in the name of applicant's family company known as Aswa Developers & Contractors Limited wherein the applicant owned 80% shares, and his alleged wife 20% shares.
8. That the request to use the Company was made by the applicant so that he could enjoy tax benefits and make VAT refund, claims and offsets. It was contended that the applicant delayed payments under the guise of delayed payments from several government agencies who owed him. That the respondent handed over the applicant's account to debt collection and the applicant admitted his liability as captured in a screenshot attached as "JSB-2" in the replying affidavit.
9. That the applicant's request to make credit purchases through the company was a scheme to defraud the respondent hence a criminal intent. That the applicant was now using the company as a shield and was underserving of any equitable relief or discretion.
10. That the case was thus ripe for piercing the corporate veil as the applicant had previously admitted the debt but denied its knowledge in his application. That he had failed to disclose material facts in his application contrary to the uberrima fides obligations of a debtor.
11. In a supplementary affidavit sworn on 29/6/2021, the applicant denied the allegations of tax evasion and contended that the respondent's averments were an admission of intentionally participating in acts of fraud to disenfranchise the government by failing to remit tax to KRA. That the respondent traded with the aforementioned company and the fact that the applicant was a director, it did not make him liable for the acts of the Company. That the statutory notice was served personally on the applicant and not on the company.
12. That the corporate veil would only be lifted upon a positive finding on liability as against the company and the respondent had failed to make the necessary application for the court's determination on liability. That fraud ought to have been pleaded and proved, and that the applicant had no intent to defraud. The applicant also contended that in his capacity as director of the company, he had reiterated the intention to settle the sum owing to the creditor, hence he had no intention to defraud.
13. The parties filed their respective submissions dated 29/6/2021 and 2/7/2021, respectively which I have carefully considered. The only issue for determination is whether the Statutory Notice dated 30/4/2021 should be set aside.
14. The applicant brought the application inter alia under Regulation 16 and 17 of the insolvency regulations ("the Regulations"). Regulation 17(6) sets out the grounds upon which a court may set aside a statutory demand as follows: -

"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”.
15. From the foregoing, the mere fact that a debt is disputed is not a sufficient ground to set aside a Statutory Notice. The court must be satisfied that the outstanding debt is disputed on grounds which are substantial.
 16. In *Peter Munga –Vs- African Seed Investment Fund LLC* [2017] eKLR, the court disallowed an application to set aside a Statutory Demand on the ground that the debt was not disputed on substantial grounds.
 17. In *Re African Safari Club Ltd* [2006] eKLR, the Court stated: -

“... It is not sufficient for a Company to say “We dispute the debt; they must show some reasonable ground for doing so ...”
 18. The power of a court to set aside a Statutory Demand is a discretionary power and one which must be exercised only in the most deserving of cases. (See *Spire Bank Limited –Vs- Nanak Singh Bansal* [2020] eKLR).
 19. The applicant alleged that he was a stranger to the debt and that the statutory notice was premised on sheer falsehood and misrepresentations. The applicant denied having entered into any commercial transaction with the creditor and denied having received any supplies from the respondent.
 20. The respondent’s response was that the applicant had received the supplies using a company in which the applicant was a director. This the applicant admitted. He invoked the principle in *Salomon vs. A. Salomon & Company Ltd* [1897] AC 22, that a limited company has a legal existence independent of its members and that a company is not an agent of its members.
 21. The respondent challenged this and submitted that there are instances where a company’s veil can be lifted, especially where a director has been dishonest, fraudulent or has entered into a business transaction with the intent to defraud a third party.
 22. In Paragraph 90 of *Halsbury’s Laws of England 4th Edition*, the learned writers state: -

“90. Piercing the corporate veil. Notwithstanding the effect of a company’s incorporation, in some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of the litigation before it, as identical with the person or persons who control that company. This will be done not only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such case the court will go behind the mere status of the company as a separate legal entity distinct from



its shareholders, and will consider who are the persons, as shareholders or even as agents, directing and controlling the activities of the company. However, where this is not the position, even though an individual's connection with a company may cause a transaction with that company to be subjected to strict scrutiny, the corporate veil will not be pierced”.

23. In *Jones & Another v Lipman & Another* (1962) 1WLR 832 Russell J. held that: -

“... if a company was thought to be a mere cloak or sham, a device or a mask which the defendant held to his face, in an attempt to avoid recognition by the eye of equity, the court could grant summary judgement even against the person behind the said company.”

24. In the present case, it was clear that the company belonging to the applicant is the one that was supplied with the materials. There was no evidence to show that it had been fronted fraudulently. Further, there was nothing to show that the said company was unable to the debt.

25. In this regard, there is nothing to show that the debt was personally incurred by the applicant, but by the company. The fact that he is a majority shareholder thereof does not make him personally liable for its debts and undertakings.

26. The respondent was acting mischievously in making the demand upon the applicant instead of the company. The Statutory Notice cannot therefore stand.

27. The upshot is that I find the application dated 24/5/2021 to be meritorious and allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JANUARY, 2022.

A. MABEYA, FCI Arb

JUDGE

