



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**INSOLVENCY CAUSE NO. 14 OF 2021**

**DORICE MWAKA MWAKWEKWE.....CREDITOR/RESPONDENT**

**VERSUS**

**XPLICO INSURANCE CO. LTD.....DEBTOR/APPLICANT**

**RULING**

Before the court for determination is a Notice of Motion dated 16<sup>th</sup> September 2021 and filed on 22<sup>nd</sup> September 2021 pursuant to Order 51 Rule 1, 4 and 13 (2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, and Regulation 77b of the Insolvency (Amendment) Regulations, 2018. The orders sought in the Notice of Motion are as follows:

- 1. That this application be certified as urgent and service thereof be dispensed with in the first instance.***
- 2. That the statutory demand dated 26<sup>th</sup> August 2021 be set aside.***
- 3. That this Honourable Court be pleased to order stay and set aside the statutory demand, noting that the defendant/applicant has filed an application dated 16<sup>th</sup> September 2021 to have the ex-parte judgment in Malindi Civil Suit No. MCC E132 of 2021 set aside and the matter be determined on merit.***
- 4. That this Honourable Court be pleased to order stay and setting aside of statutory demand in Malindi High Court Insolvency Cause No. 14 of 2021 and all consequential orders arising therefrom pending the hearing and determination of the application in Malindi Civil Suit No. MCC E132 of 2021.***
- 5. That cost of this application be in the cause.***

The application is grounded on the grounds set out on its face and the supporting affidavit of Viola Odipo wherein she deposed that the Respondent filed an application for ex-parte judgment while the Applicant was in the process of instructing their advocates Mose, Mose, & Mose Advocates to enter appearance and file their statement of defence in ***Malindi Civil Suit No. MCC E132***. Ex-parte judgment was eventually entered against the Applicant and a decree issued on 22<sup>nd</sup> July 2021. Consequently, the Respondent instituted the present insolvency proceedings via an insolvency statutory demand dated 26<sup>th</sup> August 2021. Ms. Viola deposed that the Respondent did not accord the Applicant enough time to satisfy the aforementioned decree. She added that the Applicant being a regulated business under the Insurance Regulatory Authority, it had not been shown that the Applicant was insolvent. As such, Ms. Viola deposed, the Applicant stands to be seriously prejudiced. She further deposed that there is a pending application in ***MCC E132 of 2021*** seeking to set aside the ex-parte judgment.

In response, the Respondent filed a Replying affidavit sworn by Geoffrey Kilonzo counsel for the Respondent, on 4<sup>th</sup> October 2021. Mr. Kilonzo deposed that the present application had been overtaken by events and that the statutory demand was not defective. He added that the Respondent's attempts to recover the decretal sum from the Applicant using other means proved futile and that the present insolvency suit was the only remaining avenue. He added that the accounts attached in the garnishee order were confirmed to have no funds.

The application was canvassed by way of written submissions.

**The Applicant's Submissions**

The Applicant identified two issues for determination:

**a. Whether the Respondent's demand was prematurely filed.**

The Applicant submitted that the statutory demand was prematurely filed since the Respondent failed to accord the Applicant an avenue and or methods for settlement of debt and that the Respondent did not give the Applicant time to settle the decretal sum. They relied on the cases of *Nbi Insolvency Petition No. E002 of 2020 Oldonyo Nairasha Estates (Narok) Limited v OCP Kenya Limited [2021] Eklr* and *Nbi Insolvency Petition E006 of 2020, DAC Aviation EA Limited v Stevenson Kibara Ndung'u & 8 others [2020] eKLR*.

**b. Whether it would be unjust for the statutory demand to give rise to insolvency proceedings.**

The Applicant submitted that pursuant to section 384 (2) of the Insolvency Act, 2015 as read with Regulation 77B of the Insolvency Regulations the Respondent had failed to prove beyond reasonable doubt that the value of the Applicant's assets was less than the amount of its liabilities. As such it would be unjust for the statutory demand to give rise to insolvency proceedings.

It was the Applicant's submission that if the present application is not allowed, the Applicant's application dated 16<sup>th</sup> September 2021 in the lower court would be rendered nugatory.

**The Respondent's Submissions**

On whether the statutory demand was filed prematurely, the Respondent gave a chronology of the events leading to the present insolvency proceedings. She explained that the 21 days period of the statutory demand lapsed on 21<sup>st</sup> September 2021, period which the Applicant failed to challenge the said demand.

On whether the statutory demand should be stayed and set aside, the Respondent argued that the statutory demand placed an obligation on the Applicant to discharge the burden of proof of ability to pay, as stipulated under section 107 of the Evidence Act.

The Respondent added that the present application is overtaken by events and is in breach of Regulation 16 of the Insolvency Regulations, 2016 which gives judgment debtor 21 days to make an application to set aside a statutory demand. Failure to seek leave to file the present application out of time rendered the same time barred.

It is the Respondent's submission that the application fails to meet the threshold for allowing such an application as envisaged under Regulation 17 (6) of the Insolvency Regulations. Reliance was placed on the cases of *Peter Muunga v Africa Seed Investment Fund LLC [2017] eKLR* and *Insolvency Notice E031 of 2020, Philip Muturi Mwangi v Pauline Wanjiru Nyamu*.

On whether the statutory demand was defective, the Respondent submitted that the same was in accordance with Form No.6 in the Insolvency Regulations. Further, the demand had met the requirements set out in *Halsbury's Laws of England Vol. 7, 4<sup>th</sup> Edition at Para 1446*.

Finally, citing the case of *Invesco Assurance Company Ltd v Nyamira Luxury Express Ltd & 2 others [2020] Eklr*, the Respondent argued that the Applicant has not established any legal basis to warrant this court set aside the statutory demand.

**Issues for Determination**

- 1. Whether the statutory demand was filed prematurely.**
- 2. Whether the statutory demand is defective.**
- 3. Whether this court should order a stay and set aside the statutory demand.**

It is undisputed that ex-parte judgment was entered in favour of the Respondent on 30<sup>th</sup> October 2019. Vide a letter dated 31<sup>st</sup> July 2020 the Respondent notified the Applicant of its intention to file a declaratory suit. Subsequently, the Respondent filed the declaratory suit where judgment was also entered in favour of the Respondent on 22<sup>nd</sup> July 2021. Despite being notified by way of notice of entry of judgment, the Applicant failed to pay the debt. This prompted the Respondent to serve the impugned statutory demand on 30<sup>th</sup> August 2021.

It is pertinent to note that the Insolvency Regulations, 2016 were partly amended by the Insolvency [amendment] Regulations, 2018.

Regulation 16(1) (a) of the Insolvency Regulations, 2016 is clear that an application to set aside may be made within 21 days after service of the statutory demand. The present application was filed on 22<sup>nd</sup> September 2021, approximately 2 days late and without leave of the court. From the onset, the present application is a candidate for dismissal for being filed out of time. That notwithstanding, I will address the substance of the application.

The Applicant alleged that the Respondent did not give it enough time to settle the debt thus the statutory demand herein was prematurely filed. The Applicant did not give the legal basis for this argument. Indeed, I have perused the civil procedure rules, Insolvency Act and regulations thereto, I find no provision for timelines upon which a statutory demand is to be filed upon the determination of a declaratory suit. It is my opinion therefore that this argument lacks legal essence.

On whether the statutory demand is defective, the Applicant argued that the same should have indicated methods of compliance open to the Applicant to settle the decretal sum. Form No. 6 and 32E of the Insolvency {Amendment} Regulations, 2018 provide for the form of

statutory notice to be issued to an individual and company respectively. I have perused the statutory demand issued by the Respondent herein and Form No. 32E above, and I do not find any defect in the former. The Applicant's argument that the statutory notice issued is defective is in want of legal feet on which to stand.

The Applicant's application mainly seeks that the statutory demand dated 26<sup>th</sup> August 2021 be set aside. Paragraph 6 of Regulation 17 of the Insolvency Regulations, 2016 provides for the circumstances under which a Statutory Demand may be set aside as follows: -

- 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 in grounds which appear to the court to be substantial.*
- c) *It appears the creditor holds some security in respect of the debt claimed by demand, and either paragraph (6) is not complied with 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 debt ought to be set aside.*

In the present case, it is evident that the Applicant does not dispute the debt, it does not have a counterclaim, set-off or cross demand that exceeds the debt amount. It is also evident that the Respondent does not hold any security in respect of the debt. In the circumstances, it was upon the Applicant to satisfy this court that on other grounds the demand ought to be set aside.

The reasons advanced by the Applicant are that the Respondent failed to prove that the Applicant was unable to pay its debts; that the insolvency proceedings will be bad for its image and business and that there is a pending application before the trial court to set aside the ex-parte judgment.

Section 384 (1) Insolvency Act, 2015 provides;

***The circumstances in which a company is unable to pay its debts***

***(1) For the purposes of this Part, a company is unable to pay its debts—***

***(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable satisfaction of the creditor;***

***(b) if 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; or***

***(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.***

***(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).***

The judgment that led to these proceedings was delivered on 30<sup>th</sup> October 2019. Being unable to recover the decretal sum therein, the Respondent then filed a declaratory suit. It's my finding that, this amounts to the Applicant being unable to pay its debts as stipulated under section 384 (1) (b) above. The other reasons or grounds advanced by the Applicant were not supported by any evidence.

In the foregoing, I am inclined to find that the Notice of Motion dated **16<sup>th</sup> September 2021** lacks merit and is hereby dismissed with costs to the Respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25<sup>TH</sup> DAY OF JANUARY, 2022.**

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**S.M. GITHINJI**

**JUDGE**

**In the presence of:**

1. Mr Kilonzo for the Petitioner (absent)
2. Miss Nyambuto for the Defendant/Applicant