



REPUBLIC OF KENYA



In re Liquidation of Put Sarajevo General Engineering Company Limited (Insolvency Petition E020 of 2020) [2022] KEHC 284 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E020 OF 2020**

WA OKWANY, J

MARCH 31, 2022

IN THE MATTER OF THE INSOLVENCY ACT NO 18 OF 2015

AND

IN THE MATTER OF THE COMPANIES ACT NO 17 OF 2015

RULING

1. The respondent filed the Insolvency Petition dated 26th June 2020 seeking to liquidate Put Sarajevo General Engineering Company. The petition was not opposed and a judgment date was issued but before the delivery of the judgment, the applicant filed the application dated 2nd November 2020 seeking the following orders; -
 - 1) Spent.
 - 2) Spent.
 - 3) Spent.
 - 4) THAT the Honourable Court be pleased to set aside the proceedings of 1st October 2020 in their entirety.
 - 5) THAT the petition dated 26th June 2020 be struck out for being a violation of Regulation 77 B(2)(a) of the Insolvency regulations 2016 as amended in 2018.
 - 6) THAT the petition dated 26th June 2020 be struck out for being an abuse of the Court process.
 - 7) THAT the statutory demand dated 17th march 2020 be set aside and/or vacated.
 - 8) THAT costs of this application and petition be awarded the applicant herein.
2. The application is brought under Sections 696 and 698 of the *Insolvency Act 2015*, Regulations 10(4), 16, 17(6) (b) and (d) and 77B of the *Insolvency Regulations 2016*.



3. The application is supported by the affidavit of the applicant's Human Resource & Personnel Manager Ms. Josephine Oluoch and is premised on the following grounds: -
- a. Put Sarajevo General Engineering Company Limited (hereinafter the company) has recently learnt of the existence of this petition whose ruling is scheduled to be delivered on 5th November 2020.
 - b. The company regrettably did not have sight of the standard newspaper advert of 18th August 2020 and the Kenya Gazette of 28th August 2020 at the time of the publication and only came to learn of the hearing date of 1st October when the advocate on record was perusing the cause list in search of an unrelated matter
 - c. The failure of the company to appear in court on 1st October 2020 and/or respond to the petition was not deliberate but was inadvertent due to its failure to see the aforementioned newspaper advertisement and Kenya Gazette at the time of and in the period following publication.
 - d. The company seeks the honourable courts discretion to be heard before it delivers its ruling instead of treating the petition as undefended.
 - e. The Company intends to vehemently defend the petition on the following principal grounds:
 - i. The company does not owe the debt that informs the institution of the petition.
 - ii. There was an agreement for fees between the company and the Petitioner which provided that the petitioner would be paid once the arbitration awards in the arbitral proceedings alluded to the purported statutory demand were settled.
 - iii. That the said arbitral awards have not been settled to date
 - iv. There exists no debt as alleged by the petitioner and as such, it follows that there is no creditor.
 - v. The petitioner has no locus standi and the petition is bound to fail.
 - vi. Pursuit of the petition would be a misuse of the courts process.
 - vii. It is an abuse of this courts process to use the machinery of liquidation for recovery of a debt in any event is disputed.
 - viii. It is trite that an insolvency court is not the forum under which a party can seek to recover a disputed debt.
 - ix. The petition is an abuse of the Court process and should be struck out in limine because it is being used unlawfully so as an oppressive debt collection tool against the Company.
 - x. The petition is being used to force the company to pay the amount demanded and collect a disputed debt which it will face the very draconian sword of liquidation.
 - xi. There is a genuine and substantial dispute between the petitioner and the Company on whether or not the petitioner is entitled to the amounts its is claiming.
 - xii. The petitioner wrongfully presumes that the issuance of a statutory demand without more entitles it to institute liquidation petition without demonstrating the source of the debt and whether there is a bona fide dispute on it.



- xiii. The Company was not served with the alleged statutory demand dated 17th March 2020 at its registered office.
 - xiv. The Company was not served with the alleged bills of costs dated 21st July 2016 at its registered office;
 - xv. The company is able to pay its debts as long as they are established to be genuine and proven to be due and owing
 - xvi. In any event, the value of the Company's assets exceeds the amount of its liabilities.
- f. In view of the foregoing, it is only fair that the proceedings of 1st October 2020 be set aside and the issues raised herein by the Company are heard and determined as a matter of priority as they go to the root of the petition.
 - g. The petitioner shall not suffer any prejudice if this application is heard on priority and any possible prejudice can in any event be mitigated by costs.
4. The respondent opposed the application through the replying affidavit sworn by Mr. Kenneth Alison Fraser SC who states that the Petitioner represented the Company in two arbitration matters but that the Company did not fully settle their legal fees despite several reminders thereby leading to the filing of this petition. He avers that the petitioner served the Company with the Insolvency petition by affixing a copy of the petition at its the main gate situate at 52 Lenana Road in Nairobi.
 5. The application was canvassed by way of written submissions. The Company submitted that it is able to pay its debt as long as the debt was established to be due and owing. It was submitted that the Company is solvent and that the debt that is the subject to the proceedings arose from an itemized bill of costs that was taxed without affording the company an opportunity to respond to it.
 6. The Petitioner submitted that the Company had not given satisfactory reasons for setting aside the proceedings of 1st October 2020. The Petitioner's case is that debt is admitted and that the Company did not tender any evidence to show that it is solvent or able to pay its debt.
 7. The main issue for determination is whether the applicant has made out a case for granting of the orders sought. While the applicant contended that it was not served with the petition, the petitioner maintained that it duly served the petition by affixing a copy thereof at the main gate of the Company's place of business as shown in the records of the Registrar of Companies.
 8. A perusal of the court record reveals that the Petitioner published the statutory demand on the Kenyan Gazette dated 28th August 2020. An advertisement was similarly placed on the Standard newspaper dated 18th August 2020.
 9. Section 1010 of the Companies Act 2015 provides that; -
 - 1010. Service of documents on Companies
 1. A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office.
 2. A document may be served on a registered foreign company—
 - a) by leaving it with, or sending it by post to, the local representative of the company in Kenya (or the designated local representative if there is more than one local representative); or



- b) if the company has no local representative, or if a local representative of the company refuses service or service cannot for any other reason be effected — by leaving it at, or sending it by post to, any place of business of the company in Kenya.
10. Having regard to the above provisions, I find that the Petitioner effected proper service upon the Company. Courts have taken the position that the issue of whether or not it should set aside the proceedings is a matter for the courts' discretion where sufficient cause has been established.
11. In *Wachira Karani vs Bildad Wachira [2016] eKLR* it was held that: -
- “Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”
12. In *Shah vs Mbogo & Another [1967] EA 116* it was held that the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. This discretion must be exercised for the purpose of dispensing justice to the parties, with each case getting its individual consideration on its own unique facts and circumstances, and among the factors for consideration is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit.
13. The applicant attributed its failure to attend court to the inadvertence of its advocates. I find that the reason advanced by the applicant is plausible more so considering the fact that it is trite that the mistakes of an advocate should not be visited on the client (See *Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 others in Miscellaneous Application No. 699 of 2007 reported in [2013] eKLR*). I am of the view that the Petitioner will not suffer any prejudice if the proceedings dated 1st October 2020 are set aside. In the premises I find that this is a proper case for this court to exercise its discretion in favour of the applicant
14. Consequently, I set aside the proceedings of 1st October 2020 and order that the petition dated 26th June 2020 be heard on merit. The costs of the application shall abide the outcome of the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF MARCH 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Lawson Ondieki for Petitioner.

No appearance for Respondent.

Court Assistant – Abdi

