



OOH Africa Networks Ltd v Tangerine Printing & Designs (K) Ltd (Insolvency Notice E066 of 2019) [2022] KEHC 278 (KLR) (Commercial and Tax) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E066 OF 2019**

WA OKWANY, J

MARCH 31, 2022

BETWEEN

OOH AFRICA NETWORKS LTD CREDITOR

AND

TANGERINE PRINTING & DESIGNS (K) LTD DEBTOR

RULING

Background

1. The Creditor and Debtor herein had a business relationship in which the Debtor hired the Creditor to carry out printing and design work. The Creditor would raise invoices upon delivery of printed goods/ items and the Debtor, through its officers, would sign and stamp the delivery notes.
2. The Creditor's case is that it did work worth Kshs 522,836.11 and raised various invoices which the debtor acknowledged but refused to settle thus precipitating the issuance of a Statutory Notice under the Insolvency Act.

The Application

3. The Debtor filed the instant Application dated 18th December 2019 seeking to set aside the Statutory Notice on grounds that: -
 - a The alleged debt is disputed as;
 - (i) No Local Purchase order has been attached;
 - (ii) No judgment or decree has been attached;
 - (iii) The Debtor has never admitted the debt.



- b. The Statutory Notice is not properly executed.
4. The Creditor opposed the application through a Replying Affidavit sworn by Daniel C. Manyu. The Creditor's case is that the Statutory Notice was properly executed in compliance with the Insolvency Act and Regulations. The Creditor observed that the Debtor has not denied that it delivered works, signed the Delivery Notes for goods supplied, Stamped the Delivery notes for goods supplied and received the invoices.
5. The Creditor maintained that at no time was he issued with Local Purchase Orders throughout their business relationship with the debtor and contended that there is no unequivocal denial of the debt. The Creditor noted that the Debtor only claims that it suspended payment due to alleged failure by the Creditor to attach Local Purchase Order.
6. I have considered the pleadings filed herein together with the parties' submissions. I find that the main issues for determination are as follows: -
- a) Whether the Statutory Notice dated 22nd November, 2029 was properly executed;
- b) Whether the debt is disputed on substantial grounds.

(a) Whether the Statutory Notice was properly executed;

7. The Debtor's case was that the Statutory Notice is not properly executed. The Creditor, on the other hand, maintained that the notice was properly executed. Section 384 (1)(a) of the Insolvency Act stipulates as follows on the requisite components of a statutory demand notice in the case of liquidation of companies: -

“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 a 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”

8. In *Re Kipsigis Stores Limited* [2017] eKLR, the court held as follows on the components of a statutory demand: -

“A cursory glance at the now repealed Section 220 of the Companies Act as well as Section 384 of the Insolvency Act and the relevant Regulations 16 & 17 of the Insolvency Regulations (LN 47 of 2016), would reveal that a substantially compliant statutory demand is one that is dated, issued under the hand of the creditor, states the amount of debt, states purpose of notice (to commence liquidation process if there is non-compliance) and states also time for compliance as 21 days from date of service. There is no explicit requirement that the notice should state under which Section of the Act it has been issue. It is also apparent, and I hold the view, that even where the statutory demand is not fully compliant it should not be fatal to the insolvency proceedings.”



9. In the case of *Odongo Nairasha Estates (Narok) Limited vs OCP Kenya Limited* [2021] eKLR the court stated as follows: -

The section lays emphasis on the substance of the statutory demand and does not dwell on the appearance of a valid statutory demand.

The served statutory demand was drafted in strict compliance with the prescribed Form 32E of the Insolvency Act (Amendment) Regulations 2018 and on filing in court was duly endorsed by the Deputy Registrar.

The Debtor alleges that the Statutory Demand should be set aside on the ground that the Creditor had not signed its signature. It is clear that a statutory demand should only be signed by the Registrar of the High Court of Kenya after confirming the veracity of the debt from the supporting documents that accompany a statutory demand.

10. The above decisions indicate that a statutory demand/notice should only be signed by the Registrar of the High Court and that a Statutory Notice under the insolvency Act is valid if it substantially complied with the statute and the regulations.
11. I have perused the statutory demand that is the subject of this application and I note that it was issued by the Creditor and signed by Deputy Registrar. The demand also states the amount of debt and the purpose of the notice. The Debtor has also not denied that it was duly served with the said notice.
12. Guided by the above cited cases and provisions of Section 384 (i) (a) of the Insolvency Act, I find that the notice substantially complied with the statute.

(b) Whether the debt is disputed on substantial grounds

13. The Debtor's case is that it disputes the debt and hence the insolvency proceedings cannot proceed. I however note that the following facts were not disputed: -
- a) That work was carried out by the creditor and goods delivered;
 - b) The delivery notes were signed and stamped by the Debtor;
 - c) The invoices amounting to Kshs 522,836.11 were raised but were not paid.
14. The Debtor's case was that it suspended payment because the invoices were not accompanied by Local Purchase order. The Creditor, on the other hand, stated that that Debtor did not issue it with any Local Purchase Order (LPO) and that it could not therefore be expected to have attached it.
15. The question which the court has to grapple with is whether the absence of the local purchase order connoted that they did not exist. My finding is that since the Creditor denied that it was issued with the LPOs, the burden rested on the Debtor to prove that it issued the LPOs to the Creditor. My further finding is that this is a straight forward claim of a debt following the delivery of goods that were accepted by the Debtor who signed and stamped the delivery notes. I note that the Debtor did not deny that it received the goods that are subject of the delivery notes and neither did the Debtor prove that the invoices were only payable if they were accompanied by LPOs.
16. My finding is that the debt herein is clearly not disputed. A dispute would only arise if the goods were not supplied or if the goods had been paid for. I am not persuaded that failure to attach the LPOs to the invoices is a substantial ground to dispute the debt in the face of Creditor's position that it was never issued with the LPOs.



17. Courts have taken the position that a debtor can only halt the insolvency process based on disputed debt and that the debt must be substantially disputed as opposed to mere dispute. This was the finding in Re the Matter of African Safari club Limited (2006) eKLR where Maraga J. (as he then was) stated as follows on what constitutes a substantial ground: -

What is a substantial ground, in my view, differs from one case to another. *In Re Welsh Brick Industries, Limited* [1946] ALL ER 197 it was held that there being a fair probability that the company has a bona fide defence which would entitle it to an unconditional leave to defend a claim in the ordinary court is not enough. There must be some substantial ground for defending the action. For instance, where there is a question as to whether there is in fact a debt or not that is of course a substantial ground warranting the striking out of the petition as an abuse of the process of the court. See *New Travellers Chambers Ltd v Cleese and Green* (1874) 70 LT271.

If, however, the dispute is based on frivolous grounds the petition will be allowed to go on. In *Re London and Paris Banking Corporation*, Equity cases 444 Sir G. Jessel MR stated that “It is not sufficient for a company to say “we dispute the debt’; they must show some reasonable ground for doing so.” *In Re Anglo – Bavarian Steel Ball Company* (2) (1899) WN 80 cited with approval in *Tanganyika Produce Agency Limited* [1957] EA 241 it was held that:

“If it is shown that an alleged dispute is not a bona fide one the objection to the petition fails. Thus it is not uncommon for a company, after again and again begging for time for payment of the debt to spring on the petitioner at the last moment the assertion that the debt is a disputed one. Such a defence is naturally open to great suspicion and meets with no favour from the court.”

18. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 18th December 2019 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main petition.

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

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Gacagu for Creditor/Respondent.

HKM Advocates for Mrs Ayimba.

Court Assistant: Abdi

