



**Avoveg Health Kenya Limited v Financial Access Commerce
And Trade Services (K) Ltd (Insolvency Cause E080 of 2021)
[2022] KEHC 11320 (KLR) (Commercial and Tax) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11320 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E080 OF 2021**

JN MULWA, J

APRIL 21, 2022

IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015

AND

IN THE MATTER OF THE INSOLVENCY REGULATIONS 2016

AND

**IN THE MATTER OF THE INSOLVENCY (AMENDMENT)
REGULATIONS, 2018**

BETWEEN

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AVOVEG HEALTH KENYA LIMITED APPLICANT

AND

**FINANCIAL ACCESS COMMERCE AND TRADE SERVICES (K)
LTD RESPONDENT**

RULING

1. The Debtor (“Applicant”) has approached this court by way of a Notice of Motion dated 17th November, 2021 purportedly brought under Regulations 77 and 78 of the *Insolvency Regulations*. The application seeks, inter alia, to strike out or set aside a Statutory Demand dated 27th October, 2021 issued by the Creditor (“the Respondent”).
2. The application is supported by an Affidavit sworn on 17th November, 2021 and a Further Affidavit sworn on 12th January 2022 by Nathan Loyd, a director of the Applicant Company.



3. The Respondent opposed the application vide a Replying Affidavit sworn on 7th December 2021 by its Director, Mutiso Ndambuki.
4. The application was canvassed by way of written submissions which the court has duly considered. The following are the issues that arise for determination:
 - a. Whether the Application should be struck out for being anchored on the wrong provisions of the law.
 - b. Whether the Applicant has made out a case for setting aside of the statutory demand dated 27th October 2021.
Whether the Application should be struck out for being anchored on the wrong provisions.
5. The Respondent contended that the application is untenable and defective in form for being anchored on the wrong provisions of law since there is no corresponding provision for setting aside of statutory demands issued to companies under Regulations 77 and 78 of the *Insolvency Regulations* cited by the Applicant. It submitted that in the premises, the application is incompetent and should be struck out in limine with costs. Reliance was placed on *Kwale International Sugar Co Ltd v Epco Builders Ltd & 2 Others* [2020] eKLR, *Rufus Ragui & Another v Vivo Energy Kenya Limited* [2020] eKLR and *Oldonyo Nairasha Estates (Narok) Limited v OCP Kenya Limited* [2021] eKLR where courts found similar applications anchored on Regulations 16 and 17 relating to bankruptcy of natural persons to be incompetent to that extent.
6. On the other hand, the Applicant averred that failure to cite the appropriate provisions of law on which its application is anchored is not fatal. The Applicant relied on *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others* [2020] eKLR, *Mohamed Aden Abdi v Abdi Nur Omar & 2 others* [2007] eKLR and *In the Matter of Libyan Arab African Investments Company Kenya Limited* [2021] eKLR, where courts held that failure to cite the correct provisions under which applications are made is not fatal.
7. Regulations 77 and 78 of the *Insolvency Regulations* 2016 cited by the Applicant herein deal with general provisions on liquidation of companies and have nothing to do with setting aside of a statutory demand. Does this therefore mean that an application for setting aside a statutory demand anchored on the said regulations would automatically fail on that basis alone? I do not think so. In *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others* [2020] eKLR, Majanja J. while considering a similar application anchored on Regulations 16 and 17 relating to bankrupts stated that:

“...Although the application was brought under Regulations 16 and 17 of the Regulations, I am of the view that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the Regulations.”
8. Further, the Court of Appeal in *Mohamed Aden Abdi v Abdi Nuru Omar & 2 others* [2007] eKLR when dealing with an application to strike out an appeal where the Applicant cited wrong provisions held that:

“We have looked at the application and in an appropriate case, this not being one, the Court may strike out an application in which appropriate provisions are not cited. In the instant



application however, the prayers in the motion and the affidavit in support leave no doubt that the applicant was seeking an order pursuant to rule 80 of the Court Rules.”

9. I am also guided by the decision In the matter of *Libyan Arab African Investments Company Kenya Limited* [2021] eKLR where the court handling an application similar to the instant one stated that:

“Striking out the Applicant’s application for the reason that it has not cited the correct anchoring provision of the law will be against the principle of substantive justice as provided for by Article 159(2)

(d) of the Constitution.”

10. Guided by the above authorities, I note that although the instant application was brought under inappropriate provisions namely, Regulations 77 and 78 of the Insolvency Regulations, there is no doubt whatsoever that the Applicant is seeking an order to set aside of the Statutory Demand dated 27th October 2021. In the premises, striking out this application on grounds that the Applicant cited the wrong provisions of the law will not serve the ends of justice. I decline to accept the invitation to strike out the application on that ground.

Whether the Applicant has made out a case for setting aside of the statutory demand dated 27th October 2021.

11. As regards this issue, it is noteworthy that in the statutory demand dated 27th October 2021, the Respondent demanded outstanding sums of EUR 304,321 and USD 80,065 owed by the Applicant pursuant to Supply Chain Finance Credit Facility

Agreements entered into between the parties on 8th March 2019 and 10th February 2021 respectively. However, the Applicant avers that the first part of the debt arose from a Supply Chain Finance Credit Facility Agreement entered into between the parties on 2nd March 2018 but has not contested the Agreement of 8th March 2019. In the premises, the court will only focus on the two agreements referred to in the statutory demand as the source of the debt.

12. The Applicant avers that the Supply Chain Finance Credit Facility Agreement dated 10th February, 2021 was entered into between itself as the borrower, facts Advance B.V as the lender and the Respondent herein as an agent of the lender. It contends that the Statutory Demand is null and void since the Respondent, as an agent of a known principal, lacks the capacity to demand the debt arising from the agreement. Further, the Applicant contends that the statutory notice is founded on a disputed debt as the loan statement reveals that the Creditor charged exorbitant and oppressive interest. Additionally, it is contended that the statutory demand was issued prematurely as the parties had not exhausted the dispute resolution mechanism provided under clause 35 of the Agreements. Lastly, the Applicant states that it has sufficient assets to settle the due and just debts owed to the lender and has in fact offered to pay off the same, hence there was no justification for issuance of the statutory demand.

13. The Respondent on its part insists that there exists a Debtor/Creditor relationship between itself and the Applicant. In this regard, the Respondent averred that it claims the outstanding debt as a principal in its own right and as an agent of facts Advance B.V under the agreement dated 10th February, 2021. It is further averred that in any case, the Applicant has not denied its indebtedness to the Creditor and that there is no substantial dispute necessitating the invocation of the arbitration clause in the agreements. Further, the Respondent states that the Applicant has on various occasions made proposals for settlement but failed to honour the same. It was also averred that the amount offered by



the Applicant was negligible in comparison to the whole outstanding debt and that no payment has been made to date.

14. The Insolvency regulations do not have specific regulations relating to setting aside statutory demands issued to companies. However, in *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others* (*supra*) and *In the matter of Libyan Arab African Investments Company Kenya Limited* (*supra*), courts have held the view that although Regulations 16 and 17 of the *Insolvency Regulations* deal with bankruptcy of natural persons, they provide a good guide on the principles applicable where the court is called upon to exercise its inherent jurisdiction to strike out a statutory demand. The said provisions stipulate in part as follows:

“ 16. Application to set aside statutory demand

- (1) The debtor may, apply to the Court for an order to set aside the statutory demand—
 - a. within twenty-one days from the date of the service on the debtor of the statutory demand; or
 - b. if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.
- (2) Subject to any order of the Court under regulation 17 (7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.
3. The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.
4. The affidavit referred to under paragraph (3) shall—
 - (a) specify the date on which the statutory demand came into the debtor's possession;
 - b. state the grounds on which the debtor claims that it should be set aside; and
 - c. annex a copy of the statutory demand.

17. Hearing of application to set aside statutory demand

1. On receipt of an application under regulation 16, the Court may, if satisfied that no sufficient cause is shown for granting the statutory demand, dismiss the application without giving notice to the creditor.
2. The time limited for compliance with the statutory demand shall commence from the date on which the application is dismissed.
3. If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days' notice to—
 - (a) the debtor or, if the debtor's application was made by an advocate acting for him, to the advocate,
 - b. the creditor; and



- c. any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.
 4. Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.
 5. On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.
 6. The Court may grant the application 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. In the instant case, it is common ground that the debt, subject of the statutory demand dated 27th October 2021, arose from two different agreements. At clause 2 of both the Supply Chain Finance Credit Facility Agreement dated 8th March 2019 and 10th February 2021, the lenders therein, namely the Respondent herein and facts Advance B.V respectively, agreed to finance the Applicant’s procurement of goods and/or services from various suppliers. This was done on the agreement that the Applicant would pay back the invoiced amounts plus interest and other charges on or before the lapse of sixty days from the date on which the lender finances the invoice.
16. It appears that the Applicant failed to pay back the invoiced amount hence the statutory demand issued by the Respondent both in its capacity as the lender in the agreement of 8th March 2019 and the agent of facts Advance B.V in the agreement of 8th February 2021. Notably however, both of these agreements contain arbitration clauses at clause 35 thereunder which provide as follows:

"All disputes arising in connection with this Agreement between the parties hereto, if not resolved by mutual agreement between the parties within thirty (30) days, shall be referred to Arbitration and shall be conducted in accordance with the provisions of the Kenya *Arbitration Act* 1995 Act No. 4. The Arbitral Tribunal shall comprise of one (1) arbitrator who shall be legally qualified and who shall be appointed by agreement between the parties and in absence of agreement within fourteen (14) days of the notification of the dispute by either party to the other on the application of any one party by the chairman of the chartered institute of arbitrators (Kenya branch) and the decision of such arbitrator shall be final and binding on the parties. The language of the arbitration shall be English and the seat of arbitration shall be Nairobi Kenya. The costs of arbitration (including fees and expenses of arbitrators) shall be borne by the unsuccessful party unless the award provides otherwise."
15. The above clause makes reference to all disputes between the parties arising in connection with the agreements. It does not specify that the dispute must be based on substantial grounds in order to invoke the arbitration clause as suggested by the Respondent herein. It is obvious that there is a dispute as regards the interest charged on the invoiced amount so it is only proper that the same be resolved in the



manner contemplated in the agreements by the parties themselves since doing otherwise will amount to rewriting the contract between the parties.

16. I find guidance in *In the matter of Libyan Arab African Investments Company Kenya Limited (supra)*, where Majanja J. when dealing with a matter where a Creditor attempted to bypass the arbitration clause by issuing a statutory demand noted that:

The Contract subject of the dispute has an arbitration clause which mandates the parties; that is the Applicant and Respondent to proceed to arbitration in the event of a disagreement. The fact that the Respondent invoked the arbitration clause albeit against what the arbitrator considered a non-existent party does not negate the fact that there exists a dispute which has not been resolved in the manner contemplated by the parties under the Contract. This means that dispute resolution mechanism between the parties cannot be short-circuited by issuing a statutory demand under the *Insolvency Act*. By invoking the arbitration clause in the first instance, the Respondent recognised that there was a dispute that ought to have been resolved by arbitration. Although it proceeded against the wrong party, it is now estopped from denying that a dispute exists between the parties to the Contract under which its demand is based. Since the debt is disputed on substantial grounds, it then follows that the Statutory Demand dated 6th January 2021 cannot stand. It must be set aside.”

For the foregoing reasons, the Application dated 17th November 2021 is allowed, with the result that the Statutory Demand dated 27th October 2021 is set aside.

The costs of this application shall be borne by the Respondent.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL 2022.

J. N. MULWA.

JUDGE.

