



**East African Cables Limited v Trans-Africa Energy Limited (Insolvency Petition E050 of 2021) [2022] KEHC 12260 (KLR) (Commercial and Tax) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 12260 (KLR)

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

**INSOLVENCY PETITION E050 OF 2021**

**EC MWITA, J**

**JULY 29, 2022**

**IN THE MATTER OF TRANS-AFRICA ENERGY LIMITED**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND**

**IN THE MATTER OF THE COMPANIES ACT, NO. 17 OF 2015**

**BETWEEN**

**EAST AFRICAN CABLES LIMITED ..... PETITIONER**

**AND**

**TRANS-AFRICA ENERGY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The petitioner, East African Cables Ltd, (Cables), has filed a petition dated June 21, 2021, seeking to have Trans-Africa Energy Limited (Trans-Africa) liquidated, appointment of the Official receiver as interim liquidator and appointment of a Liquidator to complete liquidation process. In the alternative, Cables asks the court to make such alternative order as it may deem fit as well as costs to be paid from the assets of Trans-Africa.
2. The petition is supported by affidavits sworn by Joseph Kinyua, Cables' financial manager on June 21, 2021 and October 12, 2021 respectively. Cables states that Trans-Africa products was supplied with goods which were not paid for; that although Trans-Africa has expressly admitted the indebtedness, no payment has been made despite a settlement proposal made, not even after service of necessary demand notices.



## Response

3. Trans-Africa has opposed the petition through a replying affidavit sworn on October 7, 2021 by Ben Mutai, the managing director. Trans-Africa admits a long-standing business relationship with Cables but states that the delay in paying the debt is not deliberate. According to Trans-Africa, it is currently engaged in two major hydro-electric power plant construction projects with Kenya Tea Development Agency (KTDA) and KTDA owes it USD 1,119,568. Trans-Africa maintains that there have been numerous exchanges between the two parties regarding settlement of the debt and that the debt will be paid once KTDA pays.
4. Trans-Africa has also filed a notice of motion dated January 27, 2022 seeking to strike out the Petition. The court directed that the application be treated as part of the response to the petition.
5. The application is premised on the grounds that the petition was commenced through an invalid statutory demand dated February 10, 2021, as it was signed by the Court's Deputy Registrar instead of the creditor as required by section 384 (1) of the *Insolvency Act* (The Act).
6. Trans-Africa maintains that the petition is incompetent, incurably defective and should be struck out with costs.

## Submissions

7. Parties agreed to dispose of the petition by way of written submissions.

## Submissions by Cables

8. Cables has filed written submissions dated December 8, 2021. Cables has relied on the decision in Taylor's Industrial Flooring Limited (1990) BCC 44, cited in *Coilcolor Ltd v Camtrex Ltd* (2015) EWHC 3202 (Ch.) that a debt is due where an invoice is sent and if the debt is not disputed, failure to pay the debt is itself evidence of inability to pay.
9. Cables argues that in the Deed of Settlement of the Debt entered into by the parties on May 17, 2021 Trans-Africa irrevocably acknowledged the debt of Kshs. 25,984,422 which is within the prescribed liquidation level under section 384 (1) of the Act.
10. Cables asserts that Trans-Africa again admitted the debt in the replying affidavit and the inability to pay. In this respect, Cables relies on *Mann v Goldstein* (1968) 2 ALL ER 769 for the proposition that when the creditor's debt is established, the Court would not interfere even though the company may appear to be solvent. This is because the creditor would be entitled to present a petition and the debtor would have its own remedy in paying the undisputed debt.
11. Cables maintains that it is not privy to the transactions between Trans-Africa and KTDA and, therefore, the fact that KTDA owes Trans-Africa money is not a valid reason for not allowing the petition. Cables argues that the debt is not disputed on substantial grounds and relies on *Re Global Tours and Travel Limited* (2001) 1 EA 195; [2000] LLR 1061.
12. Regarding exhaustion of alternative modes of recovery of the debt, Cables asserts that there is no requirement either under the Act or the *Companies Act*, that liquidation proceedings should be as a last resort. In this regard, Cables relies on *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR and *Ecobank Kenya Limited vs Francis Tole Mwakidedi* [2018] eKLR.



13. Cables urges that it has established that Trans-Africa is unable to pay the debt and that it has complied with the law. Cables relies on *re Iflix (Kenya) Limited* [2020] eKLR and urges that the petition be allowed.

### **Submissions by Trans-Africa**

14. Trans-Africa's written submissions are dated March 24, 2022. Trans-Africa contends that the statutory demand does not comply with section 384 (1) (a) of the Act since it was not signed by Cables. Trans-Africa relies on *Global Truck Limited v Borderless Tracking Limited* [2020] eKLR and *Civicon Limited v Slingshot Limited* [2020] eKLR in this respect.
15. On a without prejudice basis, Trans-Africa urges the Court to grant alternative orders since liquidation is drastic in the present circumstances where it has demonstrated that it has a viable business and can pay the debt. Trans-Africa relies on section 427 of Act which gives the Court power to grant any other order that, in its opinion, the circumstances of the case require when considering a liquidation petition.
16. Trans-Africa again relies on *Synergy Industrial Credit Limited v Multiple Hauliers (EA) Limited* [2020] eKLR where the Court observed that in a winding up petition, the Court should consider the interest of the public at large apart from those of the creditors.
17. Trans-Africa again relies on *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited* [2018] eKLR on the importance of exhaustion of all other efforts to recover the debt before seeking instituting liquidation proceedings.

### **Determination**

18. I have considered the petition, response, submissions and decisions relied on by parties. Cables' case is that Trans-Africa is unable to pay the debt which has been admitted. On the other hand, Trans-Africa argues that the petition is incompetent since the statutory demand was not signed by Cables and that it is in business and is owed money which when paid will enable it pay the debt.
19. The issue that arises for determinations is whether the petition is incompetent and, depending on the answer to this issue, whether the court should order liquidation.

### **Whether the petition is incompetent**

20. Trans-Africa argues that the statutory demand was not signed as required by law rendering the petition incompetent. In the view of Trans-Africa, the statutory demand was signed by the Deputy Registrar of the Court instead of Cables thus violated the law. This rendered the petition incurably incompetent. Cables did not address this contention.
21. Section 384 of the Act provides;
  - (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. (emphasis)
22. I have perused the petition and the supporting affidavit which has annexes including an affidavit of service by Samuel Kimenye, a Process Server who served the Statutory Demand dated February 10,



2021 on February 11, 2021. The affidavit of service was sworn on March 15, 2021. A copy of the Statutory Demand addressed to Trans-Africa is attached to that affidavit of service. As Trans-Africa correctly argues, the Statutory Demand was not issued and signed by Cables but by the Deputy Registrar.

23. Section 384(1) (a) requires a creditor to serve on the debtor company a written demand requiring the debtor to pay the debt twenty-one days after service of that demand failure to which the creditor may institute liquidation proceedings. According to section 2 of the Act a creditor “includes a person entitled to enforce a final judgment or final order.”

From this definition, a creditor is the person who has a right to enforce a judgment or order. That is the person who is required to serve the statutory demand. The question is who should sign that statutory demand. This issue has been the subject of discussion by courts.

25. in *Re F.M. Macharia (K) Ltd* [2017] eKLR, the court cited Halsbury’s Laws of England 4th Ed Vol 7(2) para 1446 which outlines the ingredients of a valid statutory demand, thus:

The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor’s behalf. The statutory demand must state the amount of the debt and consideration for it or if no consideration the way if (debt) arises...The statutory demand must include an explanation to the Company of the following matters: (a) Purpose of demand and fact that if demand is not complied with, proceedings may be initiated for winding up; (b) time for compliance with notice if consequential is to be avoided and (c) methods of compliance open to the company.

The import of the decision is that the statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor’s behalf.

26. There was further discussion on the validity of a statutory notice and, in particular, who should sign the statutory demand, in *Blueline Properties Limited v Mayfair Insurance Company Ltd* [2019] eKLR. In that case it had been argued that the statutory notice served was null and void because it had not issued by Blueline Properties Limited as required by section 384 (1) (a) of the *Insolvency Act*. The court considered section 384(1)(a) and observed that the section requires the statutory notice to be issued by a creditor. The court referred to the definition of a creditor in section 2 of that Act and stated:

[40.] That definition does not include an agent, such as an advocate. A creditor on the facts before court would be Blueline, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in section 384 (1) (a) of *Insolvency Act*. Blueline was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice Blueline is unable to prove that Mayfair is unable to pay its debts.”

27. In *Global Truck Limited v Borderless Tracking Limited* [2020] eKLR, where a Statutory Notice/ Demand had been signed by the deputy registrar, the court concluded that the statutory notice had been issued contrary to statute and was not valid to mount a petition for liquidation of a company.

28. In the case at hand, the statutory demand was not signed by Cables or even the advocate, but by the Deputy Registrar. The Deputy Registrar is not the creditor and had no instruction from Cables. The Deputy Registrar could not issue the statutory notice on behalf of Cables. Counsel for Cables did not point out any provision that empowers the Deputy Registrar to issue and sign the statutory notice on behalf of a creditor.



29. From the foregoing, it is clear that what was served was not a statutory demand as envisaged by law and is invalid. In the circumstance, an invalid Statutory Demand cannot be the basis of a petition to liquidate a company. The consequence is that the petition dated June 21, 2021 is incompetent.

30. Having come to the conclusion that the petition is incompetent, there would be no basis to proceed with the matter beyond this point. The petition dated June 21, 2021 is struck out with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2022**

**E C MWITA**

**JUDGE**

