Robson Harris & Company Advocates v Invesco Assurance Company Ltd (Insolvency Notice E018 of 2021) [2022] KEHC 11903 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11903 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY NOTICE E018 OF 2021

A MABEYA, J

AUGUST 12, 2022

N THE MATTER OF THE COMPANIES ACT NO. 17 OF 2015

AND

IN THE MATTER OF THE INSURANCE ACT. CAP 487 LAWS OF KENYA

AND

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

BETWEEN

ROBSON HARRIS & COMPANY ADVOCATES ..... CREDITOR

AND

INVESCO ASSURANCE COMPANY LTD ..... APPLICANT

RULING

1. Before Court is an application dated July 15, 2021. It was brought pursuant to sections 1A and 1B of the *Civil Procedure Act*, Section 384 of the *Insolvency Act*, Regulations 16 & 17 of the *Insolvency Regulations 2016*, and Order 51 of the *Civil Procedure Rules*.

2. The application sought orders that the statutory demand dated *July 28, 2021*by the respondent be set aside or in the alternative, it be suspended for a period of 6 months to allow the parties conclude audit and reconciliation processes and file the audited reports within that period.

3. The application was supported by the affidavit of Paul Gichuhi sworn on July 15, 2021. It was contended that the respondent had filed a statutory demand dated June 28, 2021seeking to start a liquidation process against the applicant. That the debts indicated therein were disputed and was

subject to audit and reconciliation procedure thus the initiation of liquidation was immature and malicious. That the parties had entered into a deed of settlement dated March 31, 2020and the liquidation process was an antithesis of the negotiations between the parties as the applicant was committed to offset the debt.

4. It was also contended that the applicant had undergone financial strain due to the Covid-19 pandemic but it was still issuing licenses hence was a going concern and was in a good position to continue business as an insurance underwriter. It was also contended that the liquidation process would damage the applicant's credit lending thus further strain its financial situation. That it would be fair if the statutory demand could be set aside for 6 months to allow the applicant turn over its finances in line with the *Insolvency Act* whose objective is to keep companies as going concerns.

5. The respondent opposed the application vide the replying affidavit sworn by Chepchirchir Sego on September 17, 2021. He admitted that a statutory demand had been issued to the applicant for payment of a debt due failure to which the demand would result in liquidation proceedings. That the debt emanated from three court orders as evidenced by attachments produced as CS-1a, 1b and 1c. The said orders were as a result of negotiations which had culminated in consents recorded in court. The same had not been varied or set aside and were valid and enforceable.

6. It was also contended that the respondent was a stranger to the alluded audit and reconciliation process that was allegedly being undertaken by both parties. That the respondent was not a party to any such process and the applicant was misleading the Court. That upon expiry of the statutory period, the respondent instituted and served insolvency proceedings against the applicant vide Insolvency Petition E054 of 2021 thus the application had been overtaken by events. That all creditors had been duly notified of the petition vide an advertisement made on September 10, 2021and the petition was proceeding. That the application was therefore meant to deny the respondent the fruits of the various orders.

7. The Court has considered the pleadings, evidence and the written submissions filed by both parties. The simple task for determination is whether the statutory demand ought to be set aside or suspended as prayed.

8. The applicant brought the application, inter alia, under Regulation 16 and 17 of the Insolvency Regulations ("the Regulations"). Regulation 17(6) sets out the grounds upon which a court may set aside a statutory demand as follows: -

> " 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".

9. From the above, it is not enough for an applicant to plead that the debt is disputed. He must satisfy the court that the outstanding debt is disputed on grounds which are substantial.

10. In Peter Munga v African Seed Investment Fund LLC [2017] eKLR, the court disallowed an application to set aside a Statutory Demand on the ground that the debt was not disputed on substantial grounds. In Re African Safari Club Ltd [2006] eKLR, the ourt stated: -

> "... It is not sufficient for a Company to say "We dispute the debt; they must show some reasonable ground for doing so ..."

11. The power of a court to set aside a Statutory Demand is a discretionary power and one which must be exercised only in the most deserving of cases. (See Spire Bank Limited v Nanak Singh Bansal [2020] eKLR).

12. In the instant case, the applicant's case was that the statutory demand was premature as an audit and reconciliation process engaged in by both parties had not been completed to ascertain the debt, and that the demand was contradictive of the deed of settlement agreement entered into by the parties on March 31, 2020.

13. However, it was not until the respondent filed its response that the Court became aware of the fact that the debt was incurred in various court cases. That the resulting court orders were as a result of consents entered into by the parties which were later adopted as orders of the court. This is a fact the applicant did not disclose to the Court.

14. It is this court's opinion that there was a material non-disclosure on the part of the applicant as it was imperative for it to disclose that it had consented to the settlement of debts and later failed to comply with the resulting court orders.

15. Further, the respondent denied ever participating in any audit or reconciliation process. There was nothing to support the applicant's claim of the alleged pending audit/reconciliation. In any event, it was not clear why the debts would be a subject of audit if they had resulted from consents entered into by the parties.

16. In its submissions, the applicant claimed that it had made partial payments on the court orders, but again there was nothing to support that claim. The applicant's submissions were mainly centered on the fact that the application was premature as there was a consent in force, yet the applicant had failed to disclose the existence of those consent orders. The applicant cannot benefit from its own material non-disclosure.

17. In any event, the Court takes judicial notice that the respondent has already instituted and served insolvency proceedings against the applicant vide Insolvency Petition E054 of 2021 after expiry of the 21 day period. That matter has since progressed as the advertisement had already been placed and the matter is now actively in court.

18. It would be against the interest of justice to issue adverse orders without any justification with the effect of interfering with those proceedings.

19. It is evident that the applicant does not dispute the debt on any substantial grounds, and 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. The applicant failed to meet the threshold.

20. The upshot is that the application is found to be unmerited and is hereby dismissed with costs to the respondent.

    It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF AUGUST, 2022.

A. MABEYA, FCIArb

JUDGE