



**Zan Steel Limited v Jumbo Steel Mills Limited (Insolvency Notice E105 of 2021)
[2022] KEHC 14655 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E105 OF 2021**

EC MWITA, J

OCTOBER 28, 2022

BETWEEN

ZAN STEEL LIMITED APPLICANT

AND

JUMBO STEEL MILLS LIMITED RESPONDENT

RULING

1. Zan steel Mills Limited (Zan), a debtor, took out a motion on notice dated March 4, 2022 under Article 159 of *the Constitution*, sections 423, 424 and 425 of the *Insolvency Act* 2015 (the Act) and Regulations 15(6) and 77(B) of the *Insolvency (Amendment) Regulations 2018* (the Regulations), seeking to strike out of the statutory demand dated December 17, 2021 and published in the Daily Nation of February 28, 2022.
2. The gist of the application is that the impugned notice is incompetent for the reason that it was drawn and signed on behalf the creditor in violation of the law (section 384 (1) (a) of the Act and Regulation 77B (2) of the *Regulations*. Zan also believes that publication of the notice was not only malicious but was also done in bad faith and was intended to achieve collateral objective. Zan further, asserts that the statutory demand was not served as required by regulation 15(6) of the *Regulations*.
3. Jumbo Steel Mills Limited, the creditor (Jumbo), has opposed the application through a replying affidavit sworn by Harsh Indravadan Patel on March 25, 2022. Jumbo states that the application does not meet the threshold for setting aside a statutory demand; that Zan acknowledged indebtedness of Kshs. 5 million and that overstatement of a debt does not invalidate a statutory demand. Jumbo also maintains that the statutory demand complied with the regulations
4. According to Jumbo, the court is enjoined by Article 159 (2) of *the Constitution* to administer justice without undue regard to procedural technicalities, thus the application should be dismissed with costs.



5. The application seeks to strike out the statutory demand dated December 17, 2021 and published in the Daily Nation of February 28, 2022. The grounds advanced in support of the application are that the statutory demand does not comply with the law, was not served and was published in bad faith.
6. Jumbo's position is that the application does not meet the threshold for setting aside a statutory demand; the debt has been acknowledged and overstatement of a debt does not invalidate a statutory demand. Jumbo maintains that the statutory demand complied with the law.
7. 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)
8. 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."
9. From this definition, a creditor is the person who has a right to enforce a judgment or order, and that is the person who is required to serve the statutory demand. Regulation 16 allows a debtor to apply to set aside the statutory demand and regulations 17 provides how the application should be processed and dealt with.
10. The application raises two issues. First; that the statutory demand is incompetent as it was not signed by Jumbo, the creditor and second, that the statutory demand was not served.

Competency

11. The competency of the statutory demand has been impugned on the basis that it not signed by Jumbo as the creditor. The question on who should sign the statutory demand has been the subject of discussion by courts. *In Re F.M. Macharia (K) Ltd* [2017] eKLR, the court, citing *Halsbury's Laws of England* 4th Ed Vol 7(2) para 1446 on the ingredients of a valid statutory demand, stated:

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.
12. The import of that decision is that a statutory demand must be dated and signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf.
13. There was further discussion on the issue and, in particular, who should sign the statutory demand in *BlueLine Properties Limited v Mayfair Insurance Company Ltd* [2019] eKLR. The argument in that case, just like in the present case, was that the statutory demand was null and void because it had not



issued by Blueline Properties Limited as required by section 384(1)(a) of the Act. The court considered section 384(1)(a) and observed that the section requires a statutory demand 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.

14. In *Global Truck Limited v Borderless Tracking Limited* [2020] eKLR where a Statutory demand had been signed by the Deputy Registrar, and the court held that the statutory demand had been issued contrary to law, was invalid and therefore, could not mount a petition for liquidation of a company.
15. Similarly, in *East African Cables Limited v Trans-Africa Energy Limited* (NRB Insolvency Petition No. E050 of 2021) where the statutory demand had also been signed by the Deputy Registrar, the court held the statutory demand to be invalid.
16. In the present case, the statutory demand was issued and signed on behalf of Jumbo by the advocate, M M Gitonga Advocates LLP. Was that an anomaly that should lead to invalidation of the statutory demand? I do not think so. As earlier pointed out, section 384(1) requires the creditor to serve the debtor with written demand requiring the debtor to pay the debt. Section 2 of the Act defines a creditor to include a person entitled to enforce a final judgment or final order.
17. The proper interpretation of section 384(1), in my view, is that a statutory demand should be issued and signed by the creditor or an authorized agent. Such an agent can be an advocate. That is the position advanced in *Halsbury's Laws of England* 4th Ed Vol 7(2) para 1446 that the statutory demand must be dated and signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf.
18. Jumbo's advocate made the demand on its behalf and for that reason, the statutory demand issued by the advocate cannot be said to be invalid for the reason only that it was signed by the advocate. An interpretation of section 384(1) that would mean that only the creditor should sign the statutory demand would be too narrow and restrictive as to misrepresent the intent and purport of serving a statutory demand. This is so because an authorized agent such as an advocate, acts on behalf of the creditor and drawing and signing a statutory demand on instructions of the client cannot be held to be invalid. However, where, for instance, the Deputy Registrar signs a statutory demand, such a statutory demand cannot be said to have been issued by the creditor as the Deputy registrar is not an agent of the creditor.
19. That being my view of the issue, I do not think the statutory demand issued herein should be invalidated for the reason that it was signed by the advocate who in any event, was acting as the authorized agent of the creditor.

Service of statutory demand

20. The other ground on which the statutory demand has been assailed is that it was not served even though it was published in the Daily Nation of February 28, 2022. On that score, Zan argues that the statutory demand was maliciously published and was intended to serve a collateral purpose. Jumbo on its part maintains that the statutory demand was properly issued and that it complied with the law.



21. Section 384 is clear that the creditor must serve the written demand by leaving it at the debtor's registered office. The written demand should require the debtor to pay the debt within twenty-one days. It is after failure to comply with the demand that the creditor can take further steps including instituting an insolvency application.
22. Zan asserts that the statutory demand was not served. Jumbo's response to this claim is vague only stating that the law was complied with. I have read the affidavit in response to the application and submissions. There is no positive deposition that the statutory demand was served, when it was served and where it was served.
23. The issue of service being central to this application, Jumbo could only dislodge the claim of non service if there was demonstration through empirical evidence that the statutory demand was indeed served as required by the law. A statutory demand takes effect twenty-one days after service. Where service is not proved, like in this case, any action taken in furtherance of the statutory demand is premature, against the law and therefore unlawful.
24. In the circumstances, Jumbo could not lodge the statutory demand on 24th of February 2022 and publish it in the newspaper on February 28, 2022 without serving it on Zain, the debtor. I agree with Zan that publication of the statutory demand in the newspaper was not only malicious but was also done in bad faith.
25. Consequently, the application dated March 4, 2022 succeeds and is allowed. The statutory demand dated December 17, 2021 and published in the Daily Nation of February 28, 2022 is struck out. Costs of the application to the applicant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2022

E C MWITA

JUDGE

