



In re Harmo Engineering & Building Contractors Limited (Insolvency Petition E048 of 2021) [2022] KEHC 14192 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E048 OF 2021**

A MABEYA, J

OCTOBER 21, 2022

RULING

1. Before Court is the application dated September 10, 2021 by Hamo Engineering & Building Contractors Ltd (“the applicant”), seeking to set aside the statutory demand dated April 17, 2021 and leave for the respondent to challenge the statutory demand outside the requisite time.
2. The application is premised on the grounds on the face of the application and is supported by the affidavit of Alison Zephaniah Mogege sworn on September 10, 2022.
3. The applicant’s case is that it disputed its indebtedness to the petitioner as it did not receive the goods which were subject to the petition. It was stated that the petitioner had filed a suit against the respondent wherein the respondent had denied being indebted to the petitioner and thereafter the said suit was withdrawn. Thereafter, a statutory notice was issued when the company director was down with covid-19 and therefore was unable to access the same within the statutory period. It is the applicant’s case that the petition was meant to embarrass the applicant as it was able to settle its dues.
4. In opposition, the petitioner filed a replying affidavit dated October 14, 2021 sworn by Ravi Gada. He deponed that the application was bad in law as the applicant failed to invoke the applicable law. It was further contended that the applicant had failed to prove that the debt was disputed and that it was within the petitioner’s right to choose the method for recovering the debt. That the petitioner would suffer unsurmountable loss if the prayers sought were granted.
5. The application was canvassed by written submissions which I have considered.
6. The applicant submitted that the statutory notice was incompetent for it did not emanate from court and that the debt was disputed. Further, counsel submitted that an advertisement of the petition would affect the applicant’s assets forcing it to close down.
7. On the other hand, the petitioner submitted that the applicant did not meet the threshold for setting aside the statutory demand. It was further submitted that the debt owed by the applicant was evidenced



in the invoices raised by the petitioner and that there was no proof by the applicant that the debt was disputed on substantial grounds.

8. The first issue is whether leave should be granted to the applicant to challenge the statutory demand out of time. The applicant's contention is that the petitioner issued the statutory demand when the applicant's director was down with covid and therefore was unable to see the statutory demand within time.
9. The statutory demand is dated April 17, 2021 whereas this application was filed on September 10, 2021. The statutory period for applying to set aside a statutory demand according to regulation 16(1) of the *Insolvency Regulations* is within 21 days of its issuance. It is apparent that the delay occasioned was about four months. I find that the reasons given by the applicant are not satisfactory.
10. However, since no prejudice was shown to be occasioned to the petitioner if the extension is granted, I allow the application be filed out of time.
11. The second issue is whether the requirements for setting aside the statutory demand have been met. The applicant challenged the statutory demand on the grounds that the debt was disputed. The application was grounded on the fact that the debt was disputed on several substantive grounds and that the debt was not genuine as the applicant never received the goods forming the basis of the debt.
12. In response the petitioner averred that the applicant had performed part of his obligation and in doing so was entitled to recover the debt owed to it.
13. In *Universal Hardware Limited v African Safari Club Limited*, [2013] eKLR, the court held that: -

“The principle as I understand is that a disputed debt on substantial and bona fide grounds cannot be the subject of a winding-up proceeding on account of the company's inability to pay its debts. The case law and scholarly writings are categorical that a creditor's petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”
14. Similarly, in the case of *Re: Global Tours and Travels Limited* [2001] EA 195, the court observed that: -

“...in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.”
15. In view of the above dictums, where the debt is disputed on substantial grounds the statutory demand should be dismissed to allow the parties determine the dispute in an ordinary civil case. However, the burden of proof is on the debtor to demonstrate that there are genuine reasons for disputing the debt.
16. *In Re African Safari Club Ltd* [2006] Eklr, the court stated the following with respect to sufficient ground: -

“What is a substantial ground, in my view, differs from one case to another. In *Re Welsh Brick Industries, Limited* [1946] ALL E.R. 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 – Vs – 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.”

17. Applying the above principles to the circumstances of this case, it is averred that the petitioner supplied goods to the applicant and raised several invoices for payment of the goods. However, the same were not settled thereby provoking the statutory demand. The applicant denies receiving the goods and contends that there is no debt owing to the petitioner.
18. Invoices per se is not evidence of a debt. A debt is proved by an order, delivery note and then invoice. In the present case, there is no prove of the orders and delivery of the goods. The dispute between the parties goes to the root of breach of contract and the obligations of the parties with respect to the contract.
19. The applicant contended that the petitioner had lodged a suit on the alleged debt but subsequently withdrew the same. This was not denied by the petitioner. The question that arises is, why was the suit withdrawn and the statutory demand made? In this regard, the court finds that the statutory demand was but an afterthought as the debt was disputed on valid grounds.
20. Accordingly, I find that grounds exist for the setting aside of the statutory demand and allow the application as prayed.

It is so ordered.

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

A. MABEYA, FCIArb

JUDGE

