Flower City Limited v Polytanks & Containers Kenya Limited (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling)

Flower City Limited v Polytanks & Containers Kenya Limited [2021] eKLR

Neutral citation: [2021] KEHC 34 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE 033 OF 2020

JM MATIVO, J

FEBRUARY 22, 2021

BETWEEN

FLOWER CITY LIMITED .... APPLICANT

AND

POLYTANKS & CONTAINERS KENYA LIMITED .... RESPONDENT

Elements that a debtor had to prove to set aside a statutory demand in insolvency proceedings.

Reported by Ribia John

Insolvency Law *– winding-up - creditor's winding-up petition – statutory demand - elements of - principles the court considered in evaluating a creditor's winding-up petition under the Insolvency Act - what factors did the court consider to determine whether a debtor complied with the requirements of a statutory demand - what were the elements that a debtor had to prove in a counterclaim to dispute the debt and to prove that there was a genuine dispute so as to enable the court to set aside a statutory demand in insolvency proceedings - what constituted a genuine dispute or a genuine triable issue to dispute a debt in insolvency proceedings - Insolvency Regulations, 2016, regulation 17(6).*

Brief facts

The applicant filed the instant application and prayed for the statutory demands issued against it to be set aside. The application was anchored on the grounds that the statutory demands were substantively and procedurally defective and invalid; that the alleged debt was truly disputed; and, that the statutory demands were an abuse of the court process meant to put unjustified pressure upon the applicant to pay a debt which was *bona fide* disputed. The applicant was also apprehensive that the respondent would publish the liquidation notices and initiate liquidation proceedings which would cause irreversible and irreparable injury to the applicant's reputation and businesses due to unjustified negative publicity.

Issues

i. What factors did courts consider to determine whether a debtor complied with the requirements of a statutory demand?

ii. What constituted a genuine dispute or a genuine triable issue to dispute a debt in insolvency proceedings under regulation 17(6) of the Insolvency Regulations, 2016?

iii. What were the elements that a debtor had to prove in a counterclaim to dispute a debt and to prove that there was a genuine dispute so as to enable the court to set aside a statutory demand in insolvency proceedings under regulation 17(6) of the Insolvency Regulations, 2016?

iv. What principles did the court consider in evaluating a creditor's winding-up petition under the Insolvency Act?

Held

1. A statutory demand was an important element of the creditor's bankruptcy petition as it was essentially a test of solvency. If a debtor did not comply with the statutory demand within a stipulated time, he was deemed to be unable to meet his debts and a bankruptcy application could be brought. However, a debtor passed that test of solvency if he proved that he had a genuine cross-demand with a value equal to or greater than that of the value of the statutory demand debt.
2. Subject to regulation 17(6) of the Insolvency Regulations, 2016, the existence of a genuine dispute regarding the debt was sufficient ground for the court to set aside a statutory demand. The policy underlying that provision was that the statutory demand procedure should not have been used to coerce a person to pay a disputed amount. The court had to be satisfied that there was a dispute that was not plainly vexatious or frivolous. The court had to be satisfied that there was a claim that could have some substance. Talking about a claim that had substance, it was important to mention that it was often possible to discern the spurious and to identify mere bluster or assertion. A dispute that had substance should have a sufficiently objective and *prima facie* plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile.
3. When a debtor claimed to have a counterclaim within the meaning of regulation 17(6) of the Insolvency Regulations, 2016, the court would normally set aside the statutory demand if, in the court's opinion, on the evidence, there was a genuine triable issue. The function of the bankruptcy court, on the hearing of an application brought under regulation 17 (6) was not to conduct a full hearing of the putative claim. Rather, it was simply to determine whether the claim in question, after having regard to all the circumstances, raised a genuine triable issue. The rationale for applications of that nature was to enable the debtor to satisfy the court that he genuinely disputed the debt.
4. A debtor had to demonstrate the existence of a genuine dispute. Though it could not be possible to provide a closed list of the elements of a genuine dispute, the applicant had to: -

1. show a plausible contention requiring investigation;
2. be *bona fide*, genuine and real;
3. be in good faith and show a *prima facie* plausibility;
4. truly exist in fact, and contain a serious question to be tried;
5. be something more than mere bluster or mere assertion;
6. be a claim that could have some substance;
7. have a sufficient degree of cogency to be arguable;
8. have objective existence; and
9. have sufficient factual particularity.

A genuine dispute therefore should not: -

1. be spurious, hypothetical, illusory or misconceived;
2. be plainly vexatious or frivolous;

3. be so devoid of substance that no further investigation was warranted;
4. be a merely spurious claim, bluster or assertion; and
5. be merely fanciful or futile.

5. Once a debtor showed that even one issue had a sufficient degree of cogency to be arguable, a finding of a genuine dispute had to follow. The meaning of the expression genuine dispute connoted a plausible connection requiring investigation and raised much the same sort of considerations as the serious question to be tried criterion which arose on an application for an interlocutory injunction. The court was not required to uncritically accept as giving rise to a genuine dispute every statement in a supporting affidavit. The court would not exercise its discretion unless there was a genuine triable issue. That had been equated to the test of whether there was a real prospect of success for the purpose of resisting an application for summary judgment. The debtor had to show that there was more than an arguable dispute.

6. The principles of law discernible from decisional law were clear that if a debtor had genuine and substantial grounds for disputing the debt, the court should not allow the statutory demand to stand but should instead dismiss it so that the parties could determine any dispute in a civil court. The debtor bore the onus of proof to demonstrate that there were genuine and substantial grounds for disputing the debt.

7. The true test was whether there was a *bona fide* dispute or whether there was a real dispute that was, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test could be defined as whether the debt was disputed upon substantial grounds? The true question was whether there was a substantial dispute as to the debt upon which the statutory demand was allegedly founded? Something more than mere assertion was required because if that were not so, then anyone could merely say he did not owe a debt.

8. The court had to be satisfied that the debt was not disputed on substantial grounds and was *bona fide*. The substantial dispute had to be the kind of dispute that in an ordinary civil case would amount to a *bona fide*, proper or valid defence and not a mere semblance of a defence. It was not sufficient to dispute the debt. The person disputing had to go further and demonstrate on reasonable grounds why he was disputing the debt.

9. The law permitted anyone to present a winding-up petition against a company without first requiring the would-be petitioner(s) to establish that they were eligible to present and pursue the proposed winding-up petition. A would-be petitioner was not required to undergo any pre-presentation process of judicial scrutiny, to ensure he was in fact eligible to present and pursue the petition. That left the winding-up process vulnerable to abuse, and unless the court had some power to restrain it, the process could be used as a device to pressurize a company into paying a debt the company genuinely and substantially disputed; or against which the company could deploy a genuine and substantial cross-claim.

10. Where an unjustified insolvency proceeding was presented or pursued, it amounted to an abuse of court process; and an abuse of the unconstrained right to present insolvency proceedings against a company. To enable companies facing an unjustified winding-up petition to stop the abuse before the courts, the law provided an injunctive jurisdiction to the court or power to set aside the statutory demand. On a company's application, the court could issue an order prohibiting a would-be petitioner from presenting insolvency proceedings or a winding-up petition, or if the proceedings had already been presented, the petitioner would be stopped from taking any further steps in the proceedings. Depending on where the proceedings had reached, it could mean, prohibiting the advertisement of the petition or further prosecution of it. The court could also go a step further, and strike out the proceedings.

11. The prevention of the abuse of the process of the court was the very essence of the whole of the court's jurisdiction to restrain the presentation of a winding-up petition. Conversely, whereupon judicial evaluation, the would-be petitioner was found to have proper grounds for bringing the winding-up petition, the petition would be well-founded, and so the presentation, advertisement and pursuance of that petition would not be abusive. Consequentially, the petition ought not to be restrained, but permitted to run its course. Any damage

thereby caused to the respondent company was just a natural and unavoidable consequence of the winding-up process.

12. The principles to be applied in the exercise of that jurisdiction were: -

1. A creditor's petition could only be presented by a creditor, and until a prospective petitioner was established as a creditor, he was not entitled to present the petition and had no standing in the company's court.
2. The company could challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).
3. A dispute would not be "substantial" if it had really no rational prospect of success.
4. A dispute would not be put forward in good faith if the company was merely seeking to take for itself credit which it was not allowed under the contract.
5. There was no rule of practice that the petition would be struck out merely because the company alleged that the debt was disputed. The true rule was that it was not the practice of the companies court to allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on *bona fide* grounds, because the effect of presenting a winding-up petition and advertising that petition was to put upon the company pressure to pay (rather than to litigate) which was quite different in nature from the effect of an ordinary action.
6. The court would not allow that rule of practice itself to work injustice and would be alert to the risk that an unwilling debtor was raising a cloud of objections on affidavit in order to claim that a dispute existed which could not be determined without cross-examination.
7. The court would be prepared to consider the evidence in detail even if, in performing that task, the court could be engaged in much the same exercise as would be required of a court facing an application for summary judgment.

13. The corollary of the above reasoning was an honestly advanced, but thoroughly bad reason for disputing a debt and would not be enough to warrant an injunction against the would-be petitioner. The rule was not whether or not the company simply alleged that the debt was disputed - a bare assertion. The company's assertion had to be made on substantial grounds (as well as in good faith).

14. The applicant claimed ignorance of the debt and argued that it was not aware of the goods supplied. However, in the world of business, it was not unusual for a debtor to dispute a debt. If the applicant could not recall being supplied with the goods as it claimed, an application for further and better particulars of the claim would have demonstrated good faith as opposed to a mere denial. Such an application could have afforded an opportunity to the debtor to furnish the details. More importantly, it would have provided a forum and a golden opportunity for the court to weigh the merits of the dispute. The e-mails relied upon did not discharge the required burden of proof on a balance of probabilities. The denial advanced did not meet the test of a *bona fide* and a substantially disputed debt. Such a denial could easily be rebutted and the court had to be careful, especially considering that that application proceeded *ex parte.*

15. Insolvency proceedings were class actions by their very nature. That was the reason why the law required that the proceedings be advertised. Whereas widespread knowledge that a company subject to a creditor's winding-up petition could cause that company serious harm, where the creditor's winding-up petition was warranted, that harm could just be an unfortunate consequence of a valid legal process being pursued against it. Where the creditor's winding-up petition was unwarranted and was eventually dismissed because it was unwarranted, its dismissal would be cold comfort to the company where, in the intervening period between presentation and dismissal, the company had suffered irreparable reputational and operational damage. Any damage thereby caused to the respondent company was just a natural and unavoidable consequence of the winding-up process.

16. A strong reason to the contrary meant something that could indicate that the prior decision was given without consideration of a statute or some authority that ought to have been followed. Talking about

consideration of a statute and authority or authorities that ought to have been followed, perhaps at that juncture it was important to recall the use of the word included in section 2 of the Insolvency Act. The use of the word left no doubt that the list was not closed. A statutory demand could be signed by an advocate who was an agent of his client.

17. The demand was drawn and filed in court by a firm of advocates. It was sealed by the Registrar of the High Court. The statutory demand contained an explanation to the debtor on the purpose of the demand and the consequences for failing to comply within the time stipulated - that bankruptcy proceedings could follow. It explained the period of time and manner in which the demand had to be complied with. The statutory demand included details of the creditor. Put differently, the statutory demand met the tests laid down in *Halsbury's Laws of England (supra*), the law and authorities. An advocate was an agent of his client, hence, the argument that the demand was not signed by the client was legally frail and unsustainable.

18. The burden was for the debtor company to show a fairly arguable basis for setting aside the statutory demand. The court could set aside a statutory demand if it was satisfied that there was a genuine dispute about the existence of the debt; or if the court was satisfied that there was a genuine dispute about the amount of the debt, so much of that amount as the court was satisfied was not the subject of such a dispute.

19. Offsetting the claim meant a genuine claim that the company had against the respondent by way of counterclaim, set-off or cross demand (even if it did not arise out of the same transaction or circumstances as a debt to which the demand related.) Additionally, the court could by order set aside the demand if it was satisfied that-: -

1. because of a defect in the demand, substantial injustice would be caused unless the demand was set aside; or
2. there was some other reason why the demand should be set aside. Strictly speaking, unless the above reasons were established, the court ought not to set aside a statutory demand merely because of a defect.

Application dismissed.

Citations

Cases

1. *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389— (Explained)
2. *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others* Insolvency Notice Petition E006 of 2020 [2020] eKLR — (Cited)
3. *Global Truck Limited v Borderless Tracking Limited* Insolvency Petition 1 of 2019 — Explained
4. *Mjengo Limited v Commissioner of Domestic Tax* Civil Appeal 85 of 2014 [2016] eKLR — (Cited)
5. *Peter Munga v African Seed Investment Fund LLC* Insolvency Cause 2 of 2016 [2017]eKLR— (Followed)
6. *Universal Hardware Limited v African Safari Club Limited* Civil Appeal 209 of 2007[2013]eKLR — (Explained)

New Zealand

Taylor's Industrial Flooring Ltd [1990] BCC 44, [1990] BCLC 216, (1990) 8 ACLC 529 — Mentioned

United Kingdom

1. *Angel Group Ltd v British Gas Trading Ltd* [2012] EWHC 2702 (Ch) — (Explained)
2. *Ashworth v Newnote Ltd* [2007] EWCA Civ 793 — (Mentioned
3. *Collier v P&MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329; [2008] 1 WLR 643 — Mentioned
4. *In re Company* (No 0160 of 2004)—(Mentioned)
5. *In re Welsh Brick Industries Ltd* [1946] 2 All ER 197 — Explained
6. *Taylor's Industrial Flooring Ltd* [1990] BCC 44, [1990] BCLC 216, (1990) 8 ACLC 529 — Mentioned

Statutes

1. Insolvency Act, 2015 (Act No 18 of 2015) sections 2, 384 (1) —(Interpreted)
2. Companies Act (cap 486) (Repealed) section 220 - (Interpreted)
3. Insolvency Regulations — Rule regulations 10,16 ,17 —(Interpreted)

Texts

1. Tolmie, FM.,(Ed)(1998)*Introduction to Corporate & Personal Insolvency Law*: Sweet and Maxwell
2. Wacks, R.,(Ed)(2020)*Understanding Jurisprudence* : An Introduction to Legal Theory: Oxford University Press 6th Edn

Advocates

Mr Mituga for Applicant

RULING

1. Vide an application dated 8th December 2020 expressed under the provisions of section 384(1) of the Insolvency Act [1] Regulation 10 of the Insolvency regulations, 2016 and the inherent powers of the court, Flower City Limited, (herein after referred to as the applicant) prays that the Statutory Demands dated 12th November 2020 and 18th November 2020 be set aside; and, that, an order that the costs of this application be provided for.

2. The application is anchored on the grounds that the Statutory Demands are substantively and procedurally defective and invalid; that the alleged debt is truly disputed; and, that the Statutory Demand is/are an abuse of the court process to put unjustified pressure upon the applicant to pay a debt which is bona fide disputed. The applicant is also apprehensive that the respondent will publish the Liquidation Notices and initiate liquidation proceedings which will cause irreversible and irreparable injury to the applicant's reputation and businesses due to unjustified negative publicity. Lastly, the applicant states that it is in the interests of equity and justice that this application be allowed.

3. The above grounds are explicated in the supporting affidavit of a one Kanchanbhai Dahyabhai Patel, a Director of the applicant. He avers that the Statutory Demand dated 12th November 2020 is defective and invalid for want of execution by the Respondent; that it bears a different date from the Statutory Demand forwarded to its advocates on 3rd December 2020; that the official receipt for filing of the Notice was issued on 3rd December 2020, which is after it was left at the applicant's farm on 1st December 2020; that it was improperly served; and, that the alleged debt is disputed. Mr Patel also deposed that the Statutory Demand forwarded to him on 3rd December 2020 is defective for want of execution by the respondent; that it was not served upon the Respondent; that the debt is disputed; that the amount is disputed; and that the applicant is not the respondent's debtor.

4. Additionally, he averred that the alleged debt in the Statutory Demands is for goods allegedly supplied, yet, the applicant has no records or recollection of the alleged debt. Further, that he avers that despite seeking to be furnished with copies of contracts or agreements in respect of the alleged supply of goods, or particulars of the goods supplied, or copies of Local Purchase Orders, or delivery notes, or invoices (if any) and any undertakings to pay, the aforesaid request elicited no response.

5. Mr Patel deposed that the Demand Notices are malicious and aimed at mounting improper pressure on the applicant to pay a disputed debt. Further, he deposed that unless the Statutory Demands are set aside, they will give rise to advertisements and proceedings which will cause irreversible and irreparable injury to the applicant's reputation and business interests.

6. Mr Mituga, the applicant’s advocate filed an affidavit of service deposing that the Debtor was served via e-mail and despite service, the respondent failed to respond to the application. In his submissions,

he essentially highlighted the grounds on the face of the application and the supporting affidavit. He argued that in the event the Statutory Demands are not set aside, they will give rise to the notion of inability to pay which will injure the applicant's reputation and adversely affect the company. Further, he argued that the Notices were not signed by the respondent Company hence they are invalid. In support of this proposition, he relied on *Global Truck Limited v Borderless Tracking Limited*.[2]

7. Additionally, Mr Mituga placed reliance on a passage from *Introduction to Corporate & Personal Insolvency Law*[3] in which the learned authors expounded the grounds upon which a court can set aside a Statutory Demand. These are: - if there is a Counter-claim, set off or cross demand; that the debt is substantially disputed; that the debt is secured; and lastly, that the court is satisfied that that there are other grounds for setting aside. In support of the argument that the debt is disputed, the applicant annexed copies of e-mails asking for documents in support of the goods supplied. He also argued that the Statutory Demands are not signed.

Determination

8. There is no doubt that a Statutory Demand is an important element of the Creditors' Bankruptcy Petition as it is essentially a test of solvency. If a debtor does not comply with the Statutory Demand within a stipulated time, he is deemed to be unable to meet his debts and a bankruptcy application may be brought. However, a debtor passes this test of solvency if he proves that he has a genuine cross-demand with a value equal to or greater than that of the value of the Statutory Demand debt. This rationale is concretized in regulation 17(6) which provides the grounds upon which the court may set aside a Statutory Demand: -

   a. The debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt 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 relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt;

   d. The court is satisfied, on other grounds, that the demand ought to be set aside.

9. A reading of the above provision leaves no doubt that the existence of a genuine dispute regarding the debt is a sufficient ground for the court to set aside a Statutory Demand. The policy underlying this provision is that the Statutory Demand procedure should not be used to coerce a person to pay a disputed amount. Put differently, the court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. The court must be satisfied that there is a claim that may have some substance. Talking about a claim that has substance, it is important to mention that it is often possible to discern the spurious, and to identify mere bluster or assertion. A dispute that has substance should have a sufficient objective and prima facie plausibility to distinguish it from a merely spurious claim, bluster or assertion, and sufficient factual particularity to exclude the merely fanciful or futile.

10. When a debtor claims to have a counter-claim within the meaning the above regulation, the court will normally set aside the Statutory Demand if, in its opinion, on the evidence there is a genuine triable issue. The function of the bankruptcy court, on the hearing of an application brought under regulation 17(6) is not to conduct a full hearing of the putative claim. Rather, it is simply to determine whether the claim in question, after having regard to "all the circumstances," raises a "genuine triable issue."

11. The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt. Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must: -

(i) Show a plausible contention requiring investigation;

(ii) Be *bona fide*, genuine and real;

(iii) Be in good faith and show a *prima facie* plausibility;

(iv) Truly exist in fact, and contain a serious question to be tried;

(v) Be something more than mere bluster or mere assertion;

(vi) Be a claim that may have some substance;

(vii) Have a sufficient degree of cogency to be arguable;
(viii) Have objective existence; and

(ix) Have sufficient factual particularity.

12. A genuine dispute therefore should not: -

a. Be spurious, hypothetical, illusory or misconceived;

b. Be plainly vexatious or frivolous;

c. Be so devoid of substance that no further investigation is warranted;

d. Be merely spurious claim, bluster or assertion; and

e. Be merely fanciful or futile.

13. It is important to point out that once a debtor shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The meaning of the expression "genuine dispute" connotes a plausible connection requiring investigation, and raises much the same sort of considerations as the serious question to be tried" criterion which arises on an application for an interlocutory injunction. The court is not required to uncritically accept as giving rise to a genuine dispute every statement in a supporting affidavit. The court will not exercise its discretion unless there is a 'genuine triable issue.' This has been equated to the test of whether there is a 'real prospect of success' for the purpose of resisting an application for summary judgment.[4] The debtor must show that there is more than an arguable dispute.

14. The principles of law discernible from decisional law are clear that if a debtor has a genuine and substantial grounds for disputing the debt, this court should not allow the Statutory Demand to stand but should instead dismiss it so that the parties can determine any dispute in a civil court. The Debtor bears the onus of proof to demonstrate that there are genuine and substantial grounds for disputing the debt. The true test is: - is there a bona fide dispute? Meaning; Is there a real dispute? That is, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test can be defined as: Is the debt disputed upon substantial grounds? The true question is, and always is: Is there a substantial dispute as to the debt upon which the Statutory Demand is allegedly founded? Something more than mere assertion is required because if that were not so then anyone could merely say he did not owe a debt.

15. In *Universal Hardware Limited v African Safari Club Limited*[5] the Court of Appeal summarized the position regarding striking out a Petition on account of a disputed debt as follows: -

> "The principle as I understand it is that a disputed debt on substantial and *bona fide* grounds cannot be the subject of a winding-up proceedings 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."

16. Judicial pronouncements are in agreement that the court must be satisfied that the debt is not disputed on substantial grounds and is *bona fide*. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a *bona fide*, proper or valid defense and not a mere semblance of a defense. It is not sufficient to dispute the debt. The person disputing must go further and demonstrate on reasonable grounds why he is disputing the debt.

17. The law permits anyone to present a Winding up Petition against a company without first requiring the would-be petitioner(s) to establish, they are eligible to present and pursue the proposed Winding up Petition. A would-be petitioner is not required to undergo any pre-presentation process of judicial scrutiny, to ensure he is in fact eligible to present and pursue the Petition. This leaves the Winding up Process vulnerable to abuse, and unless the court has some power to restrain, the process can be used as a device to pressurize a company into paying a debt the company genuinely and substantially disputes; or against which the company can deploy a genuine and substantial cross claim.

18. Where an unjustified insolvency proceeding is presented or pursued, it amounts to abuse of court process; and an abuse of the unconstrained right to present insolvency proceedings against a company. To enable companies facing an unjustified Winding up Petition to bring the abuse before the courts, the law provides an injunctive jurisdiction to the court or power to set aside the Statutory Demand. On a company's application, the court can issue an order prohibiting (i) a would-be petitioner from presenting insolvency proceedings or a Winding up Petition, or if the proceedings have already been presented, the Petitioner is stopped from taking any further steps in the proceedings. Depending on where the proceedings have reached, this may mean, prohibiting advertisement of the Petition or further prosecution of it. The court may also go a step further, and strike out the proceedings.

19. The prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a Winding-up Petition.[6] Conversely, where upon judicial evaluation, the would-be petitioner is found to have proper grounds for bringing the Winding up Petition, the petition will be well-founded, and so the presentation, advertisement and pursuance of that Petition will not be abusive. Consequentially the petition ought not to be restrained, but permitted to run its course. Any damage thereby caused to the respondent company is just a natural and unavoidable consequence of the winding up process.

20. I cannot recall a better exposition of the law than the concise summary of the law attributed to Norris J in *Angel Group Ltd v British Gas Trading Ltd/*.[7] He stated: -

> "The principles to be applied in the exercise of this jurisdiction are familiar and may be summarized as follows: -

a. A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor, he is not entitled to present the petition and has no standing in the *Companies Court: Mann v Goldstein* ;

b. The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750).

c. A dispute will not be "substantial" if it has really no rational prospect of success: in *In re A Company (No 012209 of 1991)*

d. A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: ibid at 354F.

e. There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: *In re A Company (No 006685 of 1996)*

f. But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination (ibid at 841C).

g. The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment: (ibid at 837B).'

21. Lord Greene MR *In re Welsh Brick Industries Ltd*[8] had this to say: - "I do not think that there is any difference between the words "bona fide disputed" and the words "disputed on some substantial ground." However, the modern approach is that the challenge to petitioner's standing as a creditor must be advanced in good faith and must raise a substantial dispute. For completeness, it is noted here that the test is the same, whether the application is for dismissal/strike out of the Petition, or for an injunction restraining it. *In re Company (No.0160 of 2004) David Donaldson QC*, said, "It is common ground and plainly the case that the test as regards striking out or restraining the presentation or advertisement of a petition must be the same." Put differently, the corollary of the above reasoning is an honestly advanced, but thoroughly bad reason for disputing a debt, will not be enough to warrant an injunction against the would-be petitioner.[9] The rule is not whether or not the company simply alleges that the debt is disputed - a bare assertion. The company's assertion must be made on substantial grounds (as well as in good faith).[10]

22. A reading of the applicant's grounds leaves no doubt that it claims ignorance of the debt and argues that it's not aware of the goods supplied. However, in the world of business, it is not unusual for a debtor to dispute a debt. In my view, if the applicant cannot recall being supplied with the goods as it claims, an application for further and better particulars of the claim would have demonstrated good faith as opposed to a mere denial. Such an application could have afforded an opportunity to the debtor

to furnish the details. More important, it would have provided a forum and a golden opportunity to the court to weigh the merits of the dispute. The e-mails relied upon do not discharge the required burden of prove on a balance of probabilities. The denial advanced does not in my view meet the test of a "*bona fide*" and a "substantially disputed debt." Such a denial can easily be rebutted and this court must be careful especially considering that this application proceeded *ex parte*.

23. The other ground advanced by the applicant is that it is apprehensive that the consequences of the advertisement may have adverse effect on the company. First, insolvency proceedings are class actions by their very nature. This is the reason why the law requires that the proceedings be advertised. Second, as stated earlier whereas widespread knowledge that a company is subject to a Creditor's Winding up Petition can cause that company serious harm, where the creditor's Winding up Petition is warranted, this harm may just be an unfortunate consequence of a valid legal process being pursued against it.Third, where the creditor's Winding up Petition is unwarranted, and is eventually dismissed because it is unwarranted, its dismissal will be 'cold comfort' to the company where, in the intervening period between presentation and dismissal, the company has suffered irreparable reputational and operational damage. Any damage thereby caused to the respondent company is just a natural and unavoidable consequence of the winding up process.

24. The other ground raised by the applicant is that the Statutory Demand was not signed by the Creditor. This argument has been the subject of judicial scrutiny and determination by our superior courts. In *Global Truck Limited v Borderless Tracking Limited,* [11]the core ground upon which the objection was raised was that the debt was disputed. In fact, the objection was allowed on this ground. However, the court went further to address the argument raised before it that the Statutory Demand was not signed.

25. The learned judge cited the definition at section 2 of the Act and concluded that a Statutory Demand is fatally defective if it is not signed by the Creditor. This decision was rendered by court of co-ordinate jurisdiction. A decision of a court of co-ordinate jurisdiction is not binding.[12] While decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity which is the respect one court holds for the decisions of another. As a concept it is closely related to *stare decisis*. *In R v Nor Elec Co*.,[13] McRuer CJHC stated: -

> " ... Sir Frederick Pollock, in his First Book of : "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary..."

26. A "strong reason to the contrary" means something that may indicate that the prior decision was "given without consideration of a statute or some authority that ought to have been followed." Talking about consideration of a statute and authority or authorities that ought to have been followed, perhaps at this juncture it is important to recall the use of the word "includes" in section 2 of the Act. The use of this word leaves no doubt that the list is not closed. The other point to note is that there exists a catena of decisions by our Superior Courts on similar applications holding that a Statutory Demand can be signed by an advocate who is an agent of his client. Among these decisions is the Court of Appeal decision in *Mjengo Limited v Commissioner of Domestic Tax*.[14] The High Court has also severally added its voice on the subject in numerous decisions. In *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others*[15] the court addressed the issue at hand with sufficient clarity. It stated: -

> 12. It has been argued that the Statutory Demand was incurably defective... I am unable to accept this argument as the use of the word, "includes" in section 2 of

the Act as stated above expands the meaning of creditor and is not exclusive to a person entitled to enforce a final judgment or final order (See *Mjengo Limited v Commissioner of Domestic Tax* CA Civil Appeal No. 85 of 2014 [2016] e KLR).

13. Further, section 2 of the Act does not require that the Statutory Demand be presented by the Creditor in person. It may be presented by an agent of the Creditor such as an advocate.This is a departure from section 220 of the *Kipsigis Stores Limited* (Repealed) which provided that the notice prior to winding up of a company must be under the hand of the creditor. In this case, the Statutory Demand was presented by the Respondents' advocates who are their agents. All in all, I am persuaded to adopt what Onguto J., stated in Re: *Kipsigis Stores Limited ML HC IP No 14 of 2016* [2017] eKLR as follows....

14. In conclusion, I find and hold that the Statutory Demand sets out the substance of the Respondents' claims by against the Company. It is substantially in Form 32E and while it is not required to be signed by the Deputy Registrar of the court, it sets out the material details required under that notice and is signed by and presented by an authorized agent of the creditor.

27. The court *in Re: Kipsigis Stores Limited*[16] expressed itself as follows: -

37. A cursory glance at the now repealed Section 220 of the Companies Act as well as Section 384 of the Insolvency Act and the relevant Regulations 16 & 17 of the Insolvency Regulations (LN 47 of 2016), would reveal that a substantially compliant statutory demand is one that is dated, issued under the hand of the creditor, states the amount of debt, states purpose of notice (to commence liquidation process if there is non-compliance) and states also time for compliance as 21 days from date of service. There is no explicit requirement that the notice should state under which Section of the Act it has been issue. It is also apparent, and I hold the view, that even where the statutory demand is not fully compliant it should not be fatal to the insolvency proceedings.

40. Clearly, an application to set aside or vacate a statutory notice on the basis of invalidity should be looked at in the light of the full circumstances of the case. The notice should not be set aside on the basis of a mere technicality. Rather regard should be had to all the circumstances including but not limited to whether the debt is owed as well as whether the overriding objective would be defeated by setting aside the notice. If no injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost.

28. I may usefully adopt the above excerpt and add a passage from *Peter Munga v African Seed Investment Fund LLC*[17] in which the Court expressed itself as follows: -

26. My view is that, when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a),(b) and (c), the question then becomes whether the applicant-debtor can show a substantial reason akin to the reasons under the preceding three paragraphs. The court must

> also consider the consequences of setting aside the demand and whether the creditor ought to pursue the bankruptcy proceedings rather than engage in a litigation that is obviously bound to succeed in his favour. The test, which is not necessarily conclusive, is whether it would be unjust for the statutory demand to give rise to insolvency proceedings in the particular case.

29. The demand was drawn and filed in court by a firm of advocates. It was sealed by the Registrar of the High Court. The statutory demand contains an explanation to the debtor on the purpose of the demand and the consequences for failing to comply within the time stipulated - that bankruptcy proceedings may follow. It explains the period of time and manner in which the demand must be complied with. The statutory demand includes details of the Creditor. Put differently, the Statutory Demand meets the tests laid down in *Halsbury's Laws of England (supra)*, the law and authorities. An advocate is an agent of his client, hence, the argument that the demand is not signed by the client is legally frail and unsustainable.

30. The burden is for the debtor company to show a fairly arguable basis for setting aside the Statutory Demand. In *AMC Construction Ltd v Frews Contracting Ltd*[18] the High Court Of New Zealand had dismissed the application to set aside the Statutory Demand holding that (i) that the applicant must show a fairly arguable case for saying the debt was not due; (ii) that it was not sufficient to merely assert the existence of a cross-claim; (iii) that the debtor company must be able to point to evidence to show that it has a real basis for its application, and that it is *bona fide* arguable; and (iv) it was also incumbent upon the debtor company to satisfy the court as to its solvency. On appeal, the Court of Appeal upheld the decision.

31. Decided cases are in agreement that the court can set aside a Statutory Demand if it is satisfied that there is a genuine dispute about the existence of the debt; or if the court is satisfied that there is a genuine dispute about the amount of the debt, so much of that amount as the court is satisfied is not the subject of such a dispute. Offsetting the claim means a genuine claim that the company has against the respondent by way of counterclaim, set off or cross demand (even if it does not arise out of the same transaction or circumstances as a debt to which the demand relates). Additionally, the court may by order set aside the demand if it is satisfied that-: - (a) because a defect in the demand, substantial injustice will be caused unless the demand is set aside; or (b) there is some other reason why the demand should be set aside. Strictly speaking, unless the above reasons are established, the court must not set aside a statutory demand merely because of a defect.

32. I have carefully weighed the grounds cited by the applicant against the jurisprudence discussed above and the law. It is my finding that the applicant has not established any basis for this court to set aside the Statutory Demand. Consequently, the applicant's application dated 8th December 2020 is hereby dismissed with no orders as to costs.

Right of appeal

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2021

JOHN M. MATIVO

JUDGE

[1] Act No 18 of 2015.

[2] [2020] eKLR.

[3] London, Sweet & Maxwell, 1998.

[4] See *Ashworth v Newnote Ltd* [2007] EWCA Civ 793; *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

[5] [2013] eKLR.

[6] See *Mann v Goldstein* [1968] 1 WLR 1091, Ungoed-Thomas J, at 1099.

[7] [2012] EWHC 2702 (Ch); [2013] BCC 265, at paragraph 22.

[8][1946] 2 All ER 197 at 198.

[9] See *Taylor's Industrial Flooring Ltd* [1990] BCC 44, Dillon LJ at page 50.

[10] See Chadwick J again from *Re a Company* No 006685 of 1996, at 832:

[11] [2020] eKLR.

[12]*R v Nor Elec Co.,* [1955] OR 431; R v Groves (1977), 17 OR (2d) 65.

[13] *Ibid*.

[14]CA Civil Appeal No 85 of 2014 [2016] eKLR).

[15] [2020] eKLR.

[16] [2017] eKLR.

[17] [2017] eKLR.

[18]High Court of Auckland CIV 2007-404-007539 (21 February 2008).