



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**INSOLVENCY NOTICE NO. E001 OF 2020**

IN THE MATTER OF : THE INSOLVENCY ACT, 2015

AND

IN THE MATTER OF : THE INSOLVENCY REGULATIONS, 2016

MARC GHISLAIN.....CREDITOR/RESPONDENT

V E R S U S

PENNINAH WAIRIMU NGINYE.....DEBTOR/APPLICANT

**RULING**

(1) Before this Court is the Notice of Motion dated **15<sup>th</sup> June 2020** filed under Certificate of Urgency by which **PENNINAH WAIRIMU NGINYE** (the Debtor/Applicant) seeks the following orders:-

“1. SPENT

2. SPENT

3. THAT the Honourable Court be pleased to set aside and/or vacate the Statutory Demand dated **28<sup>th</sup> May 2020** in its entirety.

4. THAT the costs of the application be provided for.”

(2) The application which was premised upon **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Regulations 16** and **17(6)(b)** of the **Insolvency Regulations 2016, Order 51 Rules 1 & 4** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law, was supported by the Affidavit of even date sworn by the Debtor/Applicant.

(3) The Creditor/Respondent **MARC GHISLAIN**, opposed the application through the Replying Affidavit dated **2<sup>nd</sup> July 2020**. The application was canvassed by way of written submissions. The Debtor/Applicant filed her written submissions dated **29<sup>th</sup> July 2020**, whilst the Creditor/Respondent filed his written submissions dated **21<sup>st</sup> August 2020**.

**BACKGROUND**

(4) By way of a Plaint dated **21<sup>st</sup> July 2017** the Creditor/Respondent sought to recover funds from the Debtor/Applicant. Vide an ex-parte Judgment delivered on **12<sup>th</sup> April 2018**, the learned trial Magistrate found that the Debtor/Applicant was liable to pay to the Creditor / Respondent the sum of **Kshs. 290,078**. The Creditor then extracted the orders dated **11<sup>th</sup> January 2019** and issued the Statutory Demand dated **28<sup>th</sup> May 2020** seeking payment of **Kshs. 290,078/-** plus interest failing which bankruptcy proceedings would be commenced against the Debtor.

(5) The Creditor failed to make payment as demanded and as a result the Debtors accounts held at **Standard Chartered Bank** were frozen.

The Debtor then filed the present application seeking to set aside the Statutory Demand dated **28<sup>th</sup> May 2020**. As stated earlier the application as strenuously opposed by the Creditor/Respondent.

### **ANALYSIS AND DETERMINATION**

(6) I have carefully considered the submissions filed by both parties in this matter. The issue that arises is whether the Applicant has satisfied the requirements for setting aside the Statutory Demand dated **28<sup>th</sup> May 2020**. **Section 17(3)(a)** of the **Insolvency Act 2015** provides for the procedure for the issuance of a Statutory Demand whilst **Order 15 Rule 3** of the **Insolvency Regulations** provides for the instances in which a Creditor may apply for a bankruptcy order against a Debtor. **Regulation 17(6)** of the **Insolvency Regulations** sets out the grounds upon which the Court may grant an application set aside a statutory demand as follows:-

**“(5) On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.**

**(6) The Court may grant the application 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.”**

(7) Therefore the mere fact that the debt is disputed is not sufficient grounds to set aside a Statutory Notice. The Court must be satisfied that the outstanding debt is disputed on grounds which are substantial. In the case of **PETER MUNGA –VS- AFRICAN SEED INVESTMENT FUND LLC (2017)eKLR** the learned Judge in disallowing the application to set aside a Statutory Demand found that although the debt was disputed it was **not** disputed on substantial grounds. Likewise in **RE AFRICAN SAFARI CLUB LTD 2006 eKLR** the Court 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 the above case **Hon. Justice Maraga** (as he then was) stated-

**“What is a substantial ground, in my view differs from one case to another.”**

(8) 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 –VS- NANAK SINGH BANSAL [2020]eKLR**].

(9) The Debtor / Applicant has alleged that she was unaware of the suit against her as she was not served with any Summons in the matter and as such was denied an opportunity to participate in the proceedings before the Magistrate’s Court. Further the Debtor insists that she **does not** owe the Creditor the amount in question.

(10) On the latter point a Court of law has already found that the Debtor owes the amount in question. In order to revise that finding the Debtor must file an appeal against that decision of the Magistrate’s Court.

(11) Regarding the allegation of non-service of Summons in the matter I find that the Creditor did apply and on **25<sup>th</sup> November 2019** was granted leave to effect service upon the Debtor through her e-mail address [nirata2002@hotmail.com](mailto:nirata2002@hotmail.com). The order is Annexure **MG '4a'** to the Replying Affidavit dated **2<sup>nd</sup> July 2020**. The Debtor has not denied that this is her e-mail address. Indeed the Debtor has confirmed having received the impugned statutory notice through the same e-mail address. Therefore the arguments now being raised that the Debtor was out of the country on the date when a notice was circulated in the local dailies is neither here nor there. Email is accessible whether one is within or outside the country. The Debtor cannot claim to have received the Statutory Notice yet deny receipt of the Summons. As such I find that the Debtor was aware of the suit in the lower Court but for reasons best known to herself decided not to participate in the said suit, resulting in the Ex Parte Judgment against her. Notably the Debtor has never appealed the said Judgment.

(12) Accordingly I find no merit in this present application. The Notice of Motion dated **15<sup>th</sup> June 2020** is hereby dismissed with costs to the Creditor/Respondent.

Dated in **Nairobi** this **21<sup>ST</sup>** day of **MAY, 2021**.

**MAUREEN A. ODERO**

JUDGE