REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. INP. E024 OF 2020

TRIPPLE NINE ASSOCIATES LIMITED.....PETITIONER

AND

NEXTGEN OFFICE SUITES LIMITED.....DEBTOR

RULING

Introduction

1. By a Creditor's Petition dated **27th** July 2020, Tripple Nine Associates Limited, a limited liability company (the Petitioner) moved this court under the provisions of section **425** of the Insolvency Act (the Act) seeking orders that the Nextgen Office Suites Limited, a limited liability company (the Debtor company) be declared insolvent and liquidated under the provisions of the Act. It also prayed that this court appoints an Official Receiver as the liquidator and that the costs of this Petition be paid to the Petitioner out of the assets of the Company.

2. The core ground relied upon is that as at **26th** November 2019, the Debtor company was justly and truly indebted to the Petitioner and remains so indebted in the aggregate sum of **Kshs. 20,035,586.57** being charges for supplying and installing danpalon polycarbonate panel roofing on the food court and the main atrium at the Next Gen Shopping Mall, along Mombasa Road, Nairobi.

3. The Petitioner states that over **21** days lapsed since the Debtor company was served with the Statutory Demand on **26th** November 2019, but the Debtor company has refused to pay. It averred that the company is unable to pay its debts.

Litigation history

4. On **28th** October 2020, the Petitioner's counsel Mr. Kivindyo appeared before the Deputy Registrar for directions. He was directed to serve the Debtor Company and the matter was scheduled for mention on **4th** November 2020. On the said date Mr Ratemo counsel for the Debtor company asked for time to file responses. The matter was adjourned to **2nd** December 2020, but the record does not show what happened on the said date

5. On **15th** December 2020 Mr. Kivindyo and Mr. Ratemo appeared for their respective clients. Mr. Kivindyo informed the court that he needed leave to advertise the Petition, but he intimidated that the Debtor company filed an application on **2nd** December 2020 seeking to stay these proceedings. However, both counsels informed the court that the parties were discussing settlement. I granted the parties **30** days to confirm the settlement and scheduled the matter for mention on **18th** February 2021. However, on the said date, only Mr Kivindyo attended court and he informed the court that there was no settlement. He successfully urged the court to grant the Petitioner to advertise the Petition.

6. On **16th** April 2021, Mr. Kivindyo appeared for the Petitioner, Mr. Michael appeared for 2 creditors, Mr. Nganga also appeared for a creditor, and Mr. Hashin appeared for a purchaser. He sought to be enjoined in the proceedings. There was no representation for the Debtor company. I scheduled the Debtor's application dated **12th** April 2021 for hearing on **23rd** April 2021.

The Debtor's/Company's application

7. Vide its application dated **12th** April 2021 expressed under the provisions of Regulation **10(4)** of the *Insolvency Regulations, 2016*, Regulation **6** and **19** of the *Insolvency (Amendment) Regulations 2018* and any other enabling provisions of the Law, the Debtor company seeks orders that all the proceedings in relation to the instant Petition be struck out and the costs of this application and the Petition be met by the Petitioner. Prayers (1) & (2) of the application are spent.

8. The application is founded on the grounds enumerated on the face of the application and the supporting affidavit of Rameshkumar Kantilal Amlani annexed thereto. Essentially, the Debtor company states that the Petition is fatally defective and ought to be struck out for violating Regulations **6** and **19** of the *Insolvency (Amendment) Regulations 2018*. It states that *Regulation **6** of the Insolvency (Amendment) Regulations 2018 (Legal Notice No. 7 of 2018)* requires that the Statutory Demand be endorsed by the Deputy Registrar of the High Court before it is served on the debtor.

9. The Debtor company also states that the Petitioner did not comply with *Regulation **19** of the Insolvency (Amendment) Regulations 2018 (Legal Notice 7 of 2018)* which mandatorily requires:- (a)The Petition be in Form **32C** set out in the First Schedule;(b) to be accompanied by a verifying affidavit in Form **32D** set out in the First Schedule; (c) to be accompanied by a Statutory Demand in Form **32E** set out in the First Schedule if the reason for the petition is indebtedness; and (d) to be accompanied by a statement of financial position in Form **32** set out in the First Schedule.

10. It contends that there is no valid Statutory Demand and/or valid petition and thus the proceedings cannot stand in law or otherwise, hence, the Petition is fatally defective, bad in law, incompetent, frivolous, vexatious, malicious and an abuse of the court process. Additionally, it avers that the debt is disputed.

11. It contends that the parties were directed by the court to engage in out of court negotiations on **15th** December, 2020 with a view to amicably settling the but despite the negotiations the Petitioner advertised the Petition. The Debtor company also states that it was never served with Mention Notices for **15th** March 2021 when the Petitioner sought and obtained directions to advertise the Petition. Further, it states that its application raises fundamental issues that challenge the validity of the Petition.

12. Additionally, the Debtor contends that the Petition has been lodged in bad faith, irregularly and inspired by malice as the Petitioner filed the Petition and advertised the same despite being aware that there is no existing debt or claim against the Debtor. Also, it states that the Petition and the clandestine and malicious manner the Petitioner advertised the Petition has caused the applicant immense harm and continues to adversely affect its commercial interests, and damage to reputation.

13. It also states that the Petition is an abuse of the court process and should be struck out *in limine* because the Petitioner's claim ought to be pursued through ordinary civil proceedings and not insolvency, hence, the Petition is an abuse of the liquidation jurisdiction which can only be resorted to as last resort. Lastly, it states that it is in the interest of justice and fairness that this Petition be struck out with costs.

The Petitioner's Replying Affidavit

14. Aloisius Iriga Nderi, the Petitioner's Managing Director swore the Replying affidavit dated **22nd** April 2021 in opposition to the application. He deposed that the Petitioner was engaged by the Debtor to supply and install danpalon polycarbonate panel roofing on the food court and the main atrium at the Next Gen Shopping Mall, along Mombasa Road, Nairobi, and that the Debtor had offered to pay the Petitioner by way of barter, the item on offer being exchange of the Petitioner's services with office space at the Debtor's proposed project to be erected on L.R. Number 209/92/1 Parklands Road Nairobi, measuring approximately 1,575 square feet. The Petitioner states that it never accepted the said Petitioner, as consequence the parties negotiated culminating in agreeing that the payment would be in monetary form. Further, on the **11th** August 2016, the Debtor issued the Petitioner with seven cheques of various amounts as listed at paragraph **7** of the affidavit.

15. Mr. Nderi deposed that the Petitioner successfully completed the work on **17th** March 2017 and prepared its final accounts for settlement which were approved by the Debtor. The Petitioner states that it continued to follow up the payment through e-mails, letters and telephone calls in vain. He deposed that the Debtor wrote to the Petitioner on **29th** November 2017 seeking more time in order to settle the dues, and on 15**th** December 2017 the Debtor acknowledged the debt to the Petitioner and it assured the Petitioner that the amount would be settled around **31st** January 2018. Also, he deposed that on the **31st** January 2018 the Debtor wrote to the Petitioner seeking for more time on the basis that the Debtor Company was on its final stages of resolving the receipt of its funds from oversees.

16. He averred that the Petitioner was accommodative and allowed the Debtor to settle the amount by weekly and monthly installments as detailed in a letter dated **19th** April 2018 and the Debtor issuing the cheques enumerated at paragraph **14** of the affidavit. He averred the Debtor did not settle the debt as agreed prompting the Petitioner to write on **26th** November 2018 enquiring about the instalments and threatening court action. The Petitioner instructed its advocate who issued a Demand Letter dated **26th** December 2019 followed by calls which went unanswered prompting the Petitioner to file this Petition.

17. Mr. Nderi averred that the Debtor was first served with the Petition without the Deputy Registrar's stamp on **3rd** August 2020 and it was served again with the Petition on the **28th** October 2020 duly stamped by the Deputy Registrar. The stamped Petition was also served upon the Debtor's advocates on the **24th** November 2020 as evidenced by the affidavits of service sworn Wycliff Ojore on **4th** August 2020 and Moses Wambua on **25th** Nov 2020.

18. He deposed that the parties appeared in court the **15th**December 2020 when the court directed the parties to attempt out of court settlement. Additionally, he deposed that on the **18th** February 2021, the court was not sitting and the Deputy Registrar fixed the matter for mention on **15th** March 2021. He averred that the Petitioner's advocates appeared on the **15th** March 2021 and indicated to the court that there was no settlement. He deposed that the court in its discretion granted leave to advertise on two newspapers of nationwide circulation and the Petitioner advertised in the Daily Nation and the Standard of Friday **9th** April 2021 and **12th** April 2021 respectively.

19. Further, he averred that the Debtor has not established that the court improperly exercised its discretion as laid down in *Pithon Waweru Maina v Thuka Mugiria* {1983} eKLR. Additionally, he deposed that an application to set aside a Statutory demand ought to be made within **21** days from the date it is served as provided under Regulation **16** of the *Insolvency Regulation, 2016*. He averred that the Debtor was served

with the Statutory Notice on the **27th** November 2019 and the debtor failed to comply with the said Regulation.

20. He averred that the statutory notice disclosed the amount of the debt, how the debt arose, the purpose of the demand and if the demand is not complied with, liquidation proceedings would be instituted, time for compliance and the methods of compliance. Further, he deposed that the application is incompetent, fatally defective and drafted with *mala fides* with the sole aim of defeating the Petitioner's debt.

The Debtor's supplementary affidavit

21. Mr. Rameshkumar Kantilal Amlani, a director of the Debtor Company swore the supplementary affidavit dated **27th** April 2021 in response to the Petitioner's affidavit. He averred that the Debtor's directors are himself and a one Navinchandra Nathoo Shah, and that he was aware of a company called Riayn Developers Limited whose directors are Abhinav Navinchandra Shah and Navinchandra Nathoo Shah.

22. He averred that the communication and agreements referred to by the Petitioner were between the Petitioner and Riayn Developers Limited and its aforementioned director Abhinav Navinchandra Shah and Nextgen Mall Management Limited; and not the Debtor. He deposed that the said companies are separate legal entities and they cannot purport to exercise responsibilities and power of another without express permission, authority and delegation.

23. He also deposed that payment was to be by way of barter namely, the parties were to exchange office space at "Nextgen Mall" which is owned by the Debtor which space is still available awaiting occupation by the Petitioner. Regarding the cheques, he deposed that they were issued by the Debtor to facilitate procurement of roofing materials as a sign of good faith, and, that the said cheques did not alter the terms of settlement.

The applicant's/Debtor's advocates submissions

24. Mr. Ratembo, the Creditor's advocate submitted that:- there exists no debt between the Petitioner and the Creditor, hence the Petition cannot be sustained; that the agreed mode of payment was by way of barter, specifically, it was to be made by way of exchange of commercial space; that the documents relied upon by the Petitioner relate to a different company; that the cheques exhibited by the Petitioner do not emanate from the Debtor but a different company; that a dispute exists regarding the mode of payment, that the Petitioner's claim ought to be pursued through the ordinary suits, and, there exists other remedies, hence a Petition should be a last resort.

25. Additionally, he argued that the Statutory Demand was not endorsed by the Registrar of this court and that the Petitioner never complied with Regulation **19** of the *Insolvency Regulations*. As such, he argued that there is no valid Statutory Demand or a valid Petition, hence, these proceedings cannot be allowed to stand in law, that the Petition is fatally defective, bad in law, incompetent and an abuse of court process. He submitted that the Petitioner is abusing the court by fabricating the proceedings. He argued that after the advertisement, the Debtor suffered reputational harm. He urged the court to allow the application and strike out the Petition.

Supporting Creditors advocates submissions

26. Mr. Owino and Mr. Ondieki representing Creditors did not file and affidavits. However, they supported the application and associated themselves with Mr. Ratemo's submissions.

The Petitioner's advocates submissions

27. The Petitioner's counsel Mr. Kivinyo in opposition to the application submitted that the Petitioner undertook the work as agreed and raised its invoice for settlement. He referred to the correspondence annexed to the Replying affidavit and argued that there is no contest that the Petitioner was served with a Local Purchase Order indicating the form of payment. He argued that the work done is not contested. Regarding the various companies referred to by the Debtor, he submitted that the Petitioner was dealing with the Debtor company. He referred to the annextures to the Replying affidavit and argued that the agreed mode of payment was money not barter. He argued that the offer to pay by barter was never accepted. To buttress his argument, he relied on the letter dated **10th** August 2016 and also pointed out that the Debtor company paid **Kshs. 6,000,000/=.**

28. He submitted that the existence of the debt has been proved. He argued that the Petitioner completed the work and proceeded to issue a statement of accounts. Additionally, he argued that the Debtor company admitted owing the amount. He relied on *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited {2018} e KLR* which held that *"there is no requirement under the Insolvency Act or the Companies Act which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the Insolvency Act which a creditor …could pursue to secure payment of a debt…."* He placed further reliance on section **424** of the Insolvency Act and submitted that where a debtor is unable to pay, the creditor can move to court.

29. Regarding the existence of other remedies, Mr. Kivindyo argued that liquidation is one of the options provided under the law. Regarding Regulation **6**, he argued that where a party proceeds to raise any issue regarding the Statutory Demand, the application ought to be made within **21** days. He argued that the instant application was filed in April 2021 while the Statutory Demand was served on **26th** November 2019.

30. Regarding service, he submitted that the Debtor was first served with an unsigned Statutory Demand but after it was signed by the Deputy Registrar, service was effected again in compliance with the requirements of the Act. To support his position, he cited the *Halsbury's Laws o England, Vol 7, Para 1446* which outlined the ingredients of a valid Statutory Demand. It reads *"The statutory demand must state the amount of the debt and consideration for it or of 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."

31. Additionally. Mr. Kivindyo relied on *Re: Global Tours and Travels Limited {2001} EA 195* which held that *"the substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide defense, proper or valid defense and not a mere semblance of a defense….the company must go further and demonstrate on reasonable grounds why it is disputing the debt…"* Mr. Kivindyo also placed reliance on *Kitmin Holding Limited v Noble Resources International PTE Limited {2018} e KLR* in which the court analyzed the chronology of events preceding the debt and noted that it was due for **28** days prior to the issuance of the Statutory Demand and that the creditor had indulged the debtor on several occasions. Lastly. Mr. Kivindyo relied on *Synergy Industrial Limited v Multiple Hauliers (EA) Limited {2020} e KLR* in support of the proposition that courts should be slow to strike out a Petition and it should establish whether the evidence is plain and if it is an obvious case for striking out.

Determination

32. The first ground mounted by the Debtor is that the debt is disputed. In fact, to paraphrase the Debtor's own words there is no debt at all. I have in numerous decisions expressed the view that there is no doubt that a Statutory Demand is an important element of the Creditors' Liquidation Petition because 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 liquidation Petition may be brought. However, a debtor passes this test of solvency if he proves any of the grounds listed 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.

33. The above provision leaves no doubt that the existence of a genuine dispute is a sufficient ground for the court to set aside a Statutory Demand. The rationale or basis underlying this provision is that the Statutory Demand procedure should not be used to coerce a person to pay a disputed amount. 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. A court properly directing its mind to the law, authorities and facts presented before it is capable to discern whether a dispute is spurious, and to identify whether it is a 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.

34. 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, but to simply determine whether the claim, after having regard to "all the circumstances," raises a "genuine triable issue." 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.

35. 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.

36. It is important to mention 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. (See *Ashworth v Newnote Ltd* {2007} EWCA Civ 793; *Collier v P&MJ Wright (Holdings) Ltd* {2007} EWCA Civ 1329). The debtor must show that there is more than an arguable dispute.

37. Decisional law leaves no doubt that if a debtor has a 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 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.

38. I may profitably refer to *Universal Hardware Limited v African Safari Club Limited {2013} e KLR* in which 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."

39. Judicial pronouncements are in agreement that the court must be satisfied that the debt is 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. In this regard, Norris J in *Angel Group Ltd v British Gas Trading Ltd {2012} EWHC 2702 (Ch); [2013] BCC 265, at paragraph 22.* said: -

"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 [1968] 1 W.L.R. 1091;

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 Re A Company (No.012209 of 1991) [1992] 1 W.L.R. 351 at 354B.

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) [1997] B.C.C. 830 at 832F.

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).'

40. Lord Greene MR in *Re Welsh Brick Industries Ltd{1946} 2 All ER 197 at 198* 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. See *Taylor's Industrial Flooring Ltd* [1990] BCC 44, Dillon LJ at page 50). 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). (See Chadwick J again from *Re a Company No.006685 of 1996*, at 832)

41. A reading of the Debtor's grounds on the question of the debt shows that it disputes the existence of the debt on three grounds. *One*, that the mode of payment is disputed. It states that the Petitioner was offered office space instead of cash and that the office space is still available, so it can take possession. *Two*, that the Petitioner was dealing with a totally different company, suggesting that the debt is due from another company. *Three*, there is no debt at all. I have herein above in many words described what constitutes a substantially disputed debt. The question here is whether the Debtor has established that the debt is genuinely and substantially disputed. There is no dispute the work was done. On record is a letter dated **15th** December 2017 written by the debtor stating *"we project to be able to settle the amount around **31st** January 2018."* If this was an application for summary judgment or judgment on admission in a civil suit, would the applicant's argument stand in opposition to such an application. Differently put, would the Debtor be able to persuade the court the it has a triable defense which merits a full trial. My answer is in the negative.

42. Also, on record is a letter dated **31st** January 2018, again written by the Debtor stating *"we are in the final stage of resolving and receipt of our funds from overseas."* The Debtor regretted the delay in settling the debt in this letter. Again, this is a classic case of admission. It will require something overwhelming to demonstrate that the Debtor did not mean what it stated. On the strength of this clear communication, the Debtor's argument that there exists no debt is a clear affront to logic and common sense.

43. The other ground upon which the Debtor's attempt to deny the debt collapses is the various cheques issued and also the proposal to pay by instalments. The common thread in the correspondence is that there was an arrangement to pay and cheques were issued. The Debtor pleaded for time to pay and it was allowed to pay by instalments. How then can it now deny the same debt? The forgoing leaves no doubt that the debt is not genuinely disputed. On this ground alone, the applicant's application collapses.

44. I now turn to the assault on the Statutory Demand. It was argued that the Statutory Demand should be invalidated on grounds that it was not signed by the Registrar of the court. The argument here as I understand it is that the Statutory Demand is irregular. The Petitioner's counsel explained that after filing the Petition, they served an unsigned copy but after the Deputy Registrar signed, a signed copy was duly served upon the Debtor and its advocates and affidavits of service filed. To me this explanation suffices and extinguishes the Debtor's arguments.

45. However, to crown my above conclusion, I may add that courts have been reluctant to strike out Statutory Demands on mere grounds of technicalities provided they substantially conform to the prescribed format and that no injustice is caused upon the debtor. In *DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others {2020} e KLR* it was held:

> *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).**
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> *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 **Companies Act (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….
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> *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.*

46. In *Re: Kipsigis Stores Limited {2017} e KLR* the court 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.*
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> *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.*

47. Also useful is the following excerpt from *Peter Munga v African Seed Investment Fund LLC {2017} e KLR* 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.

48. As the law stands, the debtor bears the burden to show a fairly arguable basis for setting aside the Statutory Demand. In *AMC Construction Ltd v Frews Contracting Ltd, High Court of Auckland CIV 2007-404-007539 (21 February 2008),* 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.

49. The bottom line is that after the Statutory Demand was signed by the Deputy Registrar, it was served upon the Debtor and its advocate. Guided by the jurisprudence discussed above, I find that the Debtor's argument that the Statutory Demand is incompetent for want of signature by the Deputy Registrar collapses.

50. The other ground of attack is the form of the Petition. Other than citing the Regulations, without elaborating the areas of non-compliance, the Debtor's counsel argued that it does not comply with the Regulations and described it as fatally defective. A convenient starting point is Regulation **77B (1)** of the *Insolvency Regulation* which provides: -

*(1) For the purposes of Section **425** of the Act an application for liquidation shall be:-*

(a) By way of a petition in Form 32C as set out in the First Schedule and

(b) Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule

(2) The petition for liquidation shall be accompanied by the following documents-

(a) A statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and

(b) A statement of financial position in Form 32 as set out in the First Schedule where ecessary.

51. The observance of the rules of procedure is fundamental to the course of litigation for they provide the necessary framework for the achievement of justice between the parties. At the same time courts are aware that rigid adherence to the rules in certain circumstances may inappropriately and unjustly deprive a party of his rights. More than a century ago, in *Cropper v Smith {1884} 26, ChD 700,* Bowen LJ thought it "a well-established principle that the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights."

52. In *East Africa Cables Limited v SMB Bank (K) Limited {2010} e KLR,* it was held that although the Petition was not accompanied by a verifying affidavit, it is accompanied by a "supporting affidavit" setting out the facts in the Petition supported by documents in support of the averments, and the supporting affidavit was not in the form set out in Form **32**. However, the court held that that was not fatal to the Petition. In *Benson Mulevu Mulwa & 59 others v Invesco Assurance Co. Limited & another {2020} eKLR* the court declined to strike out a Petition which was not accompanied by a verifying affidavit. I find no reason to hold that the Petition is incompetent as alleged.

53. The other ground advanced by the Debtor company is that the advertisement of the Petition caused it reputational harm. This argument collapses not on one but three fronts. *First,* insolvency proceedings are class actions by their very nature. This is the reason why the law requires that the Petition be advertised. It follows that the advertisement is a legal requirement. Failure to advertise is a breach of the law and it can be fatal to the Petition. *Second,* whereas widespread knowledge that a company is subject to a Creditor's Liquidation Petition can cause that company serious harm, where the creditor's Liquidation 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 liquidation 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 debtor company is just a natural and unavoidable consequence of the liquidation process which is prescribed by the law.

54. Lastly, the Debtor company argued that the Petitioner ought to have pursued a civil suit as opposed to liquidation proceedings. However, as stated earlier, the debtor failed to demonstrate the existence of a genuinely and substantially disputed debt. I discussed the applicable tests earlier. I need not rehash them here. I find no merit in the argument that the Petitioner should pursue a civil debt. Not when the debt is not genuinely disputed.

55. In view of my analysis of the facts, the law, the authorities and the conclusions arrived at herein above, it is my finding that the Debtor's application is unmerited. Consequently, I dismiss the application dated **12th** April 2021 with costs to the Petitioner.

Right of appeal

Orders accordingly

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE 2021

JOHN M. MATIVO

JUDGE

Delivered electronically via e-mail