



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

INSOLVENCY CAUSE NO. 3 OF 2020

IN THE MATTER OF: THE INSOLVENCY ACT NO.18 OF 2015

AND

IN THE MATTER OF: THE INSOLVENCY REGULATIONS, 2016

AND

IN THE MATTER OF: THE INSOLVENCY (AMENDMENT) REGULATIONS, 2018

AND

IN THE MATTER OF: PALEAH STORES LIMITED

AND

IN THE MATTER OF: AN APPLICATION TO SET ASIDE STATUTORY DEMAND

RULING

1. The Debtor/Applicant filed a Notice of Motion Application dated 4.08.2020 seeking to set aside the Statutory Demand dated 18.06.2020 by the Creditor herein, the same has been brought under **Sections 1A, 1B, 3A** all of the **Civil Procedure Act, CAP 21** and **Section 384 of the Insolvency Act**.
2. The Applicant has sought for orders: -
 - a. That this application be certified urgent and heard ex parte at the first instance for the grant of prayer 3;*
 - b. That the statutory demand dated 18th June, 2020 be set aside.*
 - c. There be a stay of the Statutory Demand and further insolvency proceedings herein pending the hearing and determination of this application.*
 - d. Costs of this application be borne by the petitioner.*
3. The application is premised on the grounds set out therein, and is supported by an Affidavit sworn on 4.08.2020 by **Mr. Patrick Kuria Njiru**, who is the Applicant's Director. He avers that on or about 14.07.2020, they were served with a statutory demand dated 18.06.2020 demanding an amount of US\$ 208682.33.
4. The deponent avers that the said debt is disputed since the Applicant has made several payments to the Petitioner, which the Petitioner has refused to acknowledge. Further, that the Petitioner has ignored requests to provide an updated account and proof of the sum claimed in the demand notice.
5. The deponent further states that the trading relationship between the parties was that of payment first, before taking and clearing a consignment. Therefore, the creditor has issued the Applicant with inconsistent and unsubstantiated statements of accounts showing invoices for unknown consignments yet as of 4.05.2018, the Applicant had settled all its account with the Petitioner following the issuance of a credit note of US\$ 87,574.05.
6. It is the Applicant's case that it is a sufficiently solvent company, which is able and willing to pay all its debts including any purported

debt to the sum alleged by the Petitioner. Furthermore, a meeting was held with the Petitioner's representative, Mr. **Daniel Tanui** on or about January 2019, wherein Mr. Tanui admitted that there was an error in their records regarding the Applicant's account with them. However, the said error has never been corrected.

7. The deponent avers that the Petition is in bad faith, since it is intended to exert pressure on the Applicant to concede to a disputed claim without the Petitioner having to go through the motions of proving the debt.

8. It is the Applicant's case that the statutory demand served on it is irregular and contrary to **Section 384(1) of the Insolvency Act**, as the same is not signed by the creditor.

The Response

9. The Application is opposed vide an affidavit sworn on 14.09.2020 by **Mr. Michael Nzule**, who is the creditor's Finance & Strategy Director. He avers that on or about the year 2017, the Creditor offered handling and transport logistics services to the Applicant herein worth US\$ 208,682.33. That despite a demand from the creditor to settle the outstanding debt of US\$ 208,682.33, the same has never been settled and the Applicant only contests a sum of US\$ 87,574.00. Therefore, it is only fair and just that the Debtor/Applicant be compelled to pay to the creditor the undisputed sum of US\$ 128,682.33 pending the determination of the instant Application.

10. The deponent avers that the request for reconciliation of accounts by the Applicant was done after the statutory Notice had been served. In any case, the particulars of the services offered and their value has always been within the knowledge of the Applicant and despite giving the Applicant a payment plan, it has still failed and/or refused to settle the debt.

11. It is the creditor's case that the Applicant is unable and or has refused to avail its duly audited statement of accounts before this Court to demonstrate its ability to pay its debts as alleged in its Supporting Affidavit.

12. Regarding **Section 384(1) of the Insolvency Act**, the deponent avers that the requirement of signing of the statutory demand by the creditor is out rightly false, since **Section 384(1) of the Act**, describes the circumstances in which a company is unable to pay its debts." However, in the unlikely event this Court finds that the statutory demand served upon the Applicant has an error, the creditor should be granted leave to amend and/or re-issue the statutory notice to be served afresh.

The Rejoinder

13. In rejoinder, the Applicant filed a Supplementary Affidavit sworn on 16.09.2020 by **Sheila Kaburu**, who is the Applicant's advocate. She avers that the Creditor's Replying Affidavit ought to be struck out as defective having been commissioned by an advocate practicing in the firm that has drawn the Affidavit.

14. The deponent further reiterates that the Statutory Demand is irregular since the same was not signed by the creditor.

SUBMISSIONS.

15. The parties did file submissions pursuant to the Court's directions. The Applicant/Debtor's submissions are filed on 2.10.2020 and 9.11.2020 respectively while the Creditor's submission are filed on 3.11.2020.

16. **Ms. Kaburu**, learned counsel for the Applicant has reiterated the content of the Applicant's Supporting Affidavit and submitted that the statutory demand dated 18.06.2020 is invalid having been signed by the Deputy Registrar instead of the Creditor. Counsel has cited the decision of the High Court in the case of **Global Truck Limited v Borderless Tracking Limited [2020] eKLR**, where it was held that the statutory demand must be dated and signed by the creditor himself or a person authorized to make the demand on the creditor's behalf.

17. On the issue of the debt being disputed, Counsel has submitted that there is proof of payment of a total of US\$ 80,000/= to the creditor in 2019 Therefore, the issue of how much money is due cannot be the subject of insolvency proceedings. Counsel has cited the case of **Re Turbo Eldoret Limited [2016] eKLR**, where the Court held that winding up proceedings are not for the purposes of deciding a disputed debt.

18. **Mr. Ngaine**, learned counsel for the Creditor has submitted that the Application to set aside the statutory demand was time barred and contrary to **Regulation 16(1) of the Insolvency Regulations, 2016** having been filed outside the 21 days period provided without leave.

19. On the disputed debt, Counsel has submitted that the uncontested debt of US\$ 128,682.33 still satisfies the minimum debt threshold for issuance of a Statutory Demand as set out under **Section 384(1) (a) of the Insolvency Act**.

20. On the form of the Statutory Demand, **Mr. Ngaine** has submitted that the Statutory Demand served upon the Debtor was in the format of Form 32E as set out in the First Schedule Insolvency Regulation 2016. Nevertheless, the Debtor/Applicant has not stated what prejudice it would suffer if the Statutory Notice were indeed wanting in form, which in any case is denied. Counsel has cited the case of **Re Kipsigis Stores Limited [2017] eKLR**, where the Court held that where the statutory demand is not fully compliant, it should not be fatal to the insolvency proceedings.

21. **Mr. Ngaine** has also submitted that an overstatement of a debt is not a ground for setting aside a Statutory Demand and it is not fatal. In any case the debtor is obligated to contest the amount within the requisite period.

22. In rejoinder, **Ms. Kaburu** has submitted that the issue of the Application to set aside the Statutory Demand having been filed out of time was raised for the first time during submissions. Consequently, new issues cannot be raised via written submissions.

ANALYSIS AND DETERMINATION

23. I have considered the application dated 4.8.2020, the affidavits in support and against the sale, submissions by both parties, together with the cited statute and case law. I find that the issues for determination being:

a. Whether the statutory demand is valid in terms of its format?

b. Whether the Statutory demand should be set aside?

Whether the statutory demand is valid in terms of its form?

24. The Debtor alleges that the Statutory Demand should be set aside on the ground that the Creditor had not signed it. The Creditor contends that the Statutory Demand in question was signed by the Deputy Registrar of High Court and the same is in the format of Form 32E as set out in the first Schedule Insolvency Regulations, 2016.

25. It is noteworthy that the *Insolvency (Amendment) Regulations, 2018* enacted by **Legal Notice No. 7 of 2018** amended the *Insolvency Regulations, 2016* (LN. No. 47 of 2016) (“the *Regulations, 2016*”).

26. **Regulation 15** of the *Regulations, 2016* falls under **Part V** titled, “PERSONAL BANKRUPTCY” and the side note reads, “Creditor may apply for bankruptcy order in respect of debtor”. It provides as follows:

15. (1) For the purposes of section 17 of the Act, the procedure Creditor may apply for complying with or setting aside a demand is as provided under for bankruptcy order in respect of debtor. Regulations 16 and 17.

(2) The creditor's application for bankruptcy order shall be in form of a petition in Form 3 set out in the First Schedule and shall be accompanied by the following documents— verifying affidavit which shall be in Form 4 set out in the First Schedule; proof of the debt which shall be in Form 5 set out in the First Schedule; and the application for appointment of trustee which shall be Form 9 of the First schedule.

(3) The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.

(4) The statutory demand in subregulation (3) shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor.

(5) The statutory demand specified in subregulation (3) shall be served on the debtor at least 21 days before the filing of the petition.

(6) The service of the statutory demand shall be in accordance with the Civil Procedure Rules, 2010. [Emphasis mine]

27. The introductory part of Regulation 15 above refers to Section 17 of the Act, which is to be found in PART III – BANKRUPTCY OF NATURAL PERSONS. Section 17 of the Act provides for persons entitled to make a bankruptcy petition. It is therefore clear that Regulation 15 does not apply to insolvency but to bankruptcy of a natural person. Therefore, the argument that the Statutory Demand by a company ought to be personally signed by the creditor is misguided, since Regulation 77B to the *Regulations, 2016* and which states as follows:

77B (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 necessary.

28. **Section 384(1)(a)** of the Act sets out the essential ingredients of a statutory demand as follows:

384. (1) For the purposes of this Part, a company is unable to pay its debts—

(a) if a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the company has for twenty-one days afterwards failed to pay the debt or to secure or compound for it to the reasonable

satisfaction of the creditor;

29. Having looked at the Statutory Demand, I am satisfied that it complied with **Section 384** of the **Act** and **Regulation 77B (2)(a) of Regulations, 2016** as I have set out above and the said form needs to be signed by a Registrar/Deputy Registrar.

Whether the Statutory demand should be set aside

30. I now turn to the substantive ground of the application, which relates to the debt claimed in the Statutory Demand. The Applicant/Debtor contests the statutory demand on the ground that debt claimed by the Creditor is disputed.

31. The Creditor stated that it offered the Debtor herein handling and transport logistics services worth US\$ 208,682.33. The debtor on the other hand avers that it paid the creditor US\$ 87,574.00, on 4.05.2018 and was issued with a credit memo. Further, the Debtor has annexed prove of payment of a sum of US\$ 80,000/=paid in 2019 which shows that the debt owed to the Creditor has truly been settled. The creditor prays that the debtor be compelled to pay the uncontested sum of US\$ 128,682.33 pending the determination of the Application.

32. The Court of Appeal in the case of *Universal Hardware Limited v African Safari Club Limited*, MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, summarized the position regarding striking out of a petition on account of a disputed debt as follows:

“The principle as I understand 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.”

33. Similarly, in the case of **Re: Global Tours and Travels Limited [2001] EA 195**, the learned Judge concluded that:-

“...in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt.”

34. In the case of *Peter Munga v African Seed Investment Fund LLC HC COMM IC No. 2 of 2016 [2017]* the Court declined to strike out the statutory demand on the ground that some of the amount was disputed. The court observed that:

“It is important to point out that the mere overstatement of amount claimed in a statutory demand does not per se invalidate the demand. The debtor is obligated to contest the amount and within the requisite period and additionally it must be such as to cause prejudice and injustice to the debtor if the demand was allowed to subsist.”

35. I have considered the above-cited authorities and the respective party’s cases in this it is evident that there has been an overstatement of the amount claimed in the Statutory Demand since the Creditor has refused to acknowledge the amount of US\$ 80,000/= paid to it by the debtor in instalments on 24.01.2019, 23.02.2019 and 3.06.2019.

36. **Regulation 16 of the Insolvency Regulations** provides for the procedure of seeking to set aside a statutory demand. **Regulation 17(6) Insolvency Regulations** provides the grounds upon which an application to set aside a statutory demand could be granted. Section 17(6) of the Act, which stipulates that:

“17(6) An overstatement in a statutory demand of the amount owing by the debtor does not invalidate the demand unless-

(a) the debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and

(b) the debtor makes that notification within the period specified in the demand for the debtor to comply with it.

37. Moreover, Subsection 7 anticipates that even where there is an overstatement of the amount due, the debtor is still to comply with the statutory demand. And he does so by:

“(a) Taking steps that would have complied with the demand had it stated the correct amount owing, such as by paying the creditor the correct amount owing plus cost ; and

(b) Taking those steps within the period specified in the demand for the debtor to comply.”

38. This is a case where a valid statutory demand was issued and there has not been any formal contest to the demand. Furthermore, the Debtor herein has not attempted to comply with the allegedly overstated demand as outlined under **Section 17(7) of the Insolvency Act** and paid the admitted portion of the debt.

39. Consequently, I would not set aside the statutory demand because of the allegedly overstated amount as it was also not shown to my satisfaction that there was an overstatement or that the amount was disputed on substantial grounds.

40. In *Prideinn Hotels and Investments Limited v Tropicana Hotels Limited* MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR, Visram JA., reading the majority judgment of the court, had this to say:

“[38] This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. 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 such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence.”

41. In the premises, I am unable to exercise my discretion to set aside the statutory demand dated 18.06.2020, hence the Debtor’s application fails. I proceed to dismiss the application dated and filed 4.08.2020 with costs to the Creditor.

It is so ordered

SIGNED and DATED at MOMBASA this 26TH day of JULY, 2021.

D. O. CHEPKWONY

JUDGE

DELIVERED VIRTUALLY at MOMBASA this 30TH day of JULY, 2021.

A. ONG’INJO

JUDGE