



Simba Corporation Limited v Arn Security Consultants & Training Services Limited (Insolvency Cause 13 of 2019) [2021] KEHC 438 (KLR) (Commercial and Tax) (17 December 2021) (Ruling)

Neutral citation: [2021] KEHC 438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE 13 OF 2019
MW MUIGAI, J
DECEMBER 17, 2021**

BETWEEN

SIMBA CORPORATION LIMITED CREDITOR

AND

**ARN SECURITY CONSULTANTS & TRAINING SERVICES
LIMITED DEBTOR**

RULING

Notice Of Motion

1. The Applicant filed a Notice of Motion Application dated 13th August 2019 for orders that;

The Statutory Demand dated 31st May 2019 be set aside. Which Application was supported by the sworn Affidavit of Anthony Rebo Ngure dated 13th August 2019 and based on the grounds that;

- a. Vide a Master Lease Agreement dated 18/11/14 the Debtor/ Applicant on the one part as Lessee and the Creditor/ Respondent on the other as Lessor entered into an agreement for lease of assorted motor vehicles for agreed consideration. (Marked B – copy of the master lease agreement)
- b. On diverse dates and times in the years 2015, 2016 and 2017 the Debtor/Applicant leased four (4) of the Creditor's/ Respondent's said motor vehicles vide specific Lease Agreements for each of the said motor vehicles. (Marked C – one of the lease agreements)



- c. During the Lease period the motor vehicles in question suffered numerous mechanical breakdowns whereof the Debtor/Applicant terminated the specific Lease Agreements and returned to the Creditor/Respondent the 4 motor vehicles between the months of May and June 2017.
- d. As at the time of return of the last motor vehicle the total amount outstanding stood at sum of Kshs. 4,887,393.17. Upon termination of the said specific Lease Agreements, the Debtor issued numerous post-dated cheques in partial settlement of the said debt. (Marked E – copy of the transaction detail report)
- e. The Creditor/Respondent did not return the said cheques or object to the proposed mode and schedule of payments and freely accepted receipt of the post-dated cheques and have since been depositing them as and when each has been falling due and so far, the cleared cheques amount to the total sum of Kshs. 1,700,000 and the Creditor/Respondent is holding to 5 more of the said cheques. (Marked F – copies of the cheques)
- f. The Creditor/Respondent is thus estopped from denying that in accepting the settlement of the just debt by way of installments over a long period, it did intentionally cause the Debtor/Applicant to believe that the mode of installment payment adopted was acceptable and hence leading the Debtor/Applicant to adjust its financial affairs accordingly.
- g. On 25/07/19 the Creditor/Respondent vide a statutory demand dated 31/05/19 demanded payment of the sum of Kshs. 7,114,984.41. The said statutory demand is invalid as the same overstates the actual amount owing. (Marked G – copy of the statutory demand)
- h. The criteria laid out for a Creditor to commence bankruptcy proceedings have not been met and in particular, but without prejudice to the generality of the foregoing, there is no reason to believe that the Debtor/Applicant has no reasonable prospects of being able to pay the just outstanding debt.
- i. The Debtor/Applicant employs over 400 employees and the ill-conceived precipitate action by the Creditor/Respondent will not only be prejudicial to the Debtor/Applicant but also affect the lives of hundreds of employees and their families. (Marked J – copy of a sample payroll schedule for the company)
- j. The drastic and draconian orders as projected or anticipated by the Creditor/Respondent will not be necessary under the present circumstances. It will thus be in the interest justice to set aside the said statutory demand.

Replying Affidavit



2. The Application was opposed vide the sworn Affidavit of Anthony Kibe dated 25th October 2019 and stated that;
- a. The Creditor and the Debtor entered into a Master Lease Agreement dated 18th November 2014 for the leasing of motor vehicles by the Debtor from the Creditor. Upon mutual agreement on the terms of the Agreement, the Debtor and the Creditor executed the Agreement together with three Lease Agreements all dated 18th November 2014 in respect of the following motor vehicles;
 - i. Mahindra Scorpio Reg. No. KCC 312C
 - ii. Mahindra Scorpio Reg. No. KCC 306C
 - iii. Mahindra Scorpio Reg. No. KCC 304C
 - b. Due to the Creditor's rights under the terms of the Agreement, the Creditor repossessed the motor vehicles as a result of the Debtor's default and failure to pay the periodic rent.
 - c. On 5th September 2018, the Creditor's advocates wrote to a demand letter to the Debtor for the settlement of the outstanding amount owing of Kshs.4, 287, 372 plus interest thereon. (Marked AK2 – Copy of the Demand Letter)
 - d. The Debtor's advocates responded to the demand letter vide their letter of 17th September 2018 acknowledging the debt and further sought to have a meeting to discuss a settlement of the amount owing. (Marked K3 – copy of the letter) The Creditor's advocate responded to the letter on a without prejudice basis vide a letter dated 20th September 2018 agreeing to a meeting to negotiate an amicable settlement of the debt.
 - e. The parties met on 3rd October 2018 where the Debtor stated that the terms for settlement were upfront payment of 50% of the outstanding amount and the balance to be settled in 6 equal monthly instalments consequent to which default interest would be waived. The Debtor failed to provide any settlement proposals.
 - f. Instead of making any settlement proposal, the Debtor sent 6 post-dated cheques of Kshs.100, 000 vide a letter dated 22nd October 2018. The cheques were received on a without prejudice basis and the Creditor reiterated the proposal of a lump sum of 50% of the amount due and the balance in 6 equal instalments. The Debtor instead 6 cheques all totaling to Kshs.100, 000.
 - g. The Debtor's continuous refusal to abide by the terms of the Agreement and lease agreement escalated the amount owing to Kshs.7, 114, 984.41 which includes the rental charges, service fees and interest.
 - h. The Creditor has given the debtor ample opportunity to settle the debt which opportunity has been ignored by the Debtor. The Debtor is yet to comply with the statutory demand which was validly issued on the basis of the outstanding debt.



- i. There is no counterclaim, set off or cross demand by the Debtor equaling or exceeding the amount of debt which is Kshs.7, 114, 984.41 as at 6th May 2019.

Debtor's Submissions

3. It was the Debtor's submission that the Creditor has failed to show or demonstrate that the Debtor is unable to pay or has no prospects of being able to pay. The Statutory Demand is consequently actuated by malice and is in pursuit of ulterior motives and tainted with *mala fides* deserving the intervention of the court. The said Statutory Demand is invalid as it overstates the amount owing by the Debtor. The Creditor's account contains numerous entries of unsubstantiated and unconscionable penalties described as interest on late payment and there is thus a need for proper accounts to be taken.

4. The Debtor relied on the case of [*Universal Hardware Limited versus African Safari Club Limited \[2013\] eKLR*](#) where the court stated,

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."

5. Further, the Debtor urged the Court to consider other grounds as provided under Paragraph (d) of Regulation 17 of the *Insolvency Regulations 2016* to determine if the case merits setting aside of a Statutory Demand. In the case of [*Peter Munga versus African Seed Investment Fund LLC \[2017\] eKLR*](#), the court remarked;

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."

6. The Debtor argued that the criteria laid out for a Creditor to commence insolvency proceedings have not been met and there is no reason to believe that the Debtor has no reasonable prospects of being able to pay the outstanding debt. It will be in the interest of justice to set aside the Statutory Demand.

Creditor's Submissions

7. The Creditor submitted that the Debtor has not contested there being a debt outstanding to the Creditor above the insolvency threshold of Kshs 400,000. The Debtor as at 9th July 2021 owed the creditor Kshs 5,306,527.52 and the figure accrues interest on a daily basis. The Creditor served the Debtor with several demand letters prior to approaching the court to take out the statutory notice dated 31st May 2019 and the debtor totally failed to make good of the outstanding amount.

8. The creditor is not obliged to exhaust other debt recovery method before instituting insolvency proceedings. The foregoing position was echoed by Hon. J.A Kamau [*Ecobank Kenya Limited v Francis*](#)



Tole Mwakidedi [2018] eKLR where the Court in dismissing a Preliminary Objection seeking to set aside a statutory demand held;

I find also that the petition is not premature nor an abuse of the court process as the creditor is not obliged to exhaust other recovery mechanism available to it before bringing up an application for Bankruptcy, nor can a creditor under section 14 of *Insolvency Act* move the debtor who is insolvent to seek an alternative to bankruptcy as indeed it is the duty of the debtor who is insolvent to seek alternative to bankruptcy. I therefore find no merit in ground (b) of the Preliminary Objection.”

9. The Court of Appeal in *Prideinn Hotels & Investments Limited v Tropicana Hotels Limited [2018] eKLR* in total consonance with the above position upheld a ruling of the High Court issuing a Liquidation Order. The Court held;

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, and in respect of which the appellant has been given adequate time, opportunity and indulgence.”

10. It was also the Creditor’s submission that there is no over statement in relation to what has been set out as due to the creditor and we further submit that an overstatement in the statutory demand does not necessarily invalidate the same. This was the position held by the Onguto J. in *Nairobi Insolvency Cause No 2 of 2016, Peter Munga v African Seed Investment Fund LLC [2017] eKLR* in dismissing an application seeking to set aside a statutory demand. The court held;

It is evident when one reads paragraph (d) above that the grounds for the setting aside of a statutory demand are not limited by statute and it opens it up and gives the court a spacious discretion. It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 17.”

11. The Debtor since being served with the statutory demand on the 31st May 2019 has failed to make good of the outstanding amount. The debtor has made no efforts to offset the substantial amount pending. The Debtor disputed the correctness of the outstanding amount however the debtor totally failed to clear what it deems as due during the period of 21 days as per the statutory demand.

Determination

12. After careful consideration of the Application, Response and the Submission by the by parties herein the issue for determination is whether the Statutory Demand should be set aside?
13. The Applicant herein disputed the statutory demand and contended that the statutory demand overstated the actual amount owing and was therefore defective and thus invalid. The Applicant also contended that the criteria laid out for a Creditor to commence bankruptcy proceedings had not been met.
14. The Creditor explained that the said amount was occasioned by the Debtor’s continuous refusal to abide by the terms of the Agreement and lease agreement which escalated the amount owing to Kshs.7, 114, 984.41 and which includes the rental charges, service fees and interest.



15. In the *Insolvency Act*, service of a statutory demand is a condition precedent to the commencement and success of a creditor's Petition for liquidation by the court grounded on the Company's inability to pay its debts. Section 384 of the *Insolvency Act* stipulates as follows:

384(1) For the purposes of this part (being Part VI- liquidation of companies) a Company is unable to pay its debts- if

- a. 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;

16. *In Re F.M. Macharia (K) Ltd [2017] eKLR*, the court with approval cited *Halsbury's Laws of England 4th Ed. Vol 7(2) para 1446* which outlines the ingredients of a valid statutory demand. The paragraph reads as follows:

The statutory demand must be dated and be signed by the creditor himself or by a person authorized to make the demand on the creditor's behalf. The statutory demand must state the amount of the debt and consideration for it or if 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”

17. The Creditor herein served upon the Debtor a Statutory Demand dated 31st May 2019 demanding for the payment of a sum of Kshs.7, 114, 984.41 to be paid within 21 days. With this regard the Statutory demand met all the requirements of a valid statutory demand.
18. In the present case, besides the format of the notice, the Applicant took issue with the fact of the actual amount due and owing. The Debtor vide a letter dated 9th August 2019 to the Creditor disputed the validity of the said demand and stated that the alleged amount of Kshs.7, 114, 984.41 was overstated and that the amount that was justly due was Kshs.3, 187, 393.17.
19. The Debtor relied on the provision of Section 17(6) of the *Insolvency Act* with regard to an overstatement in a Statutory Demand. The Applicant argued that it notified the Creditor that the amount demanded was overstated.
20. In the case of *Kwale International Sugar Co Ltd vs Epcu Builders Ltd & 2 Others [2020] eKLR* the court held;

The reason I have set out the aforesaid provisions is to show that to the extent that the Company relied on Regulations 16 & 17 that relates to bankruptcy of natural persons, in the instant application it is incompetent and lacks merit as Regulations 77 & 78 of Insolvency Regulations that are applicable for liquidation of Companies does not contain a corresponding provision for setting aside of statutory demands issued to Companies.”

21. The import of this case is that, the Regulations 16 & 17 of Insolvency Regulations 2016, are not applicable with regard to liquidation of Companies but for bankruptcy.



22. A statutory demand maybe set aside if the Debtor has a counterclaim, set off or cross demand that equals or exceeds the amount of debt in the demand; or the debt is disputed; the Creditor holds some security in respect of the debt claimed in the demand and/or the Court is satisfied on other ground that the demand ought to be set aside. There is no counterclaim, set off or cross demand by the Debtor equaling or exceeding the amount of debt which is Kshs.7, 114, 984.41 as at 6th May 2019.
23. The Debtor has produced copies of numerous post-dated cheques in partial settlement of the said debt that has issued to the Creditor. The Creditor on the other hand does not dispute the fact that it has been receiving the said cheques but argues that the Debtor has failed to pay the lump sum of 50% of the amount due and thus the total sum due continues to accrue in interest.

Disposition

24. In light of the above, I find that the Statutory Demand is valid. In view of the circumstances highlighted above, the Creditor's Statutory Demand dated 31st May 2019 should be suspended for a reasonable period and the suspension of the demand should be on condition that the Debtor pays the Creditor the lump sum of 50% of the amount due within 90 days of this Ruling.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2021 (VIRTUALLY)

M.W. MUIGAI

JUDGE

