



**Middle East Bank Kenya Limited v Manji Villas Limited (Insolvency Petition E015 of 2020)  
[2021] KEHC 414 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 414 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E015 OF 2020  
WA OKWANY, J  
DECEMBER 16, 2021**

**BETWEEN**

**MIDDLE EAST BANK KENYA LIMITED ..... PETITIONER**

**AND**

**MANJI VILLAS LIMITED ..... APPLICANT**

**RULING**

1. This ruling is in respect to the application dated 29<sup>th</sup> September 2020 wherein the Company/applicant seeks orders to strike out the Statutory Demand dated 6<sup>th</sup> March 2020 and the Petition filed on 12<sup>th</sup> August 2020. The applicant also seeks the costs of the application.
2. The application is supported by the affidavit of the Company's Director Zulekha Amin Gwaderi and premised on the grounds that: -
  - i. On or about 10<sup>th</sup> September 2020, the Company's Director was given a copy of a Petition dated 11<sup>th</sup> March 2020 by a close relative whereof a Statutory Demand dated 6<sup>th</sup> March 2020 by the respondent addressed to the petitioner claiming Kshs 197,972,047.92 was attached.
  - ii. The company has never been served with the statutory demand dated 6<sup>th</sup> March 2020 by the respondent and addressed to the applicant forming basis of the petition herein.
  - iii. The Company's Directors only came to discover the petition herein and notice thereto on or about 10<sup>th</sup> September 2020 through a 3<sup>rd</sup> party who furnished the Directors with a copy of the Petition herein.



- iv. Failure to serve the statutory demand on the company and or the Petition hereof as required by the law or at all renders the Petition herein incompetent and fatally defective.
  - v. The purported statutory demand dated 6<sup>th</sup> March 2020 forming basis of this Petition and the Petition thereof is otherwise an abuse of court and offends express mandatory provisions of Section 384(1) of the *Insolvency Act* requiring service of the same on the company prior to lodging the Petition.
  - vi. The debt forming basis of the Petition is loan facility of kshs 80,000.00 advanced to the company on or about 1997 and secured by a charge registered on 15<sup>th</sup> May 1997 on LR No. 209/12138 and LR No. 209/12139 in favour of the respondent.
  - vii. The debt herein arising from a charge to the petitioner by the company was fully settled by receivership of the company appointed by the petitioner and a final payment of Kshs 10,000,000.00 made on behalf of the Company/Applicant in full and final settlement of the redemption amount under the above charge which the respondent accepted and executed a discharge discharging the company from all liabilities under above debt including the Company's Receivership effective the date of the discharge.
  - viii. The respondent has already vide the above Receivership which seized, sold and realized the Company's assets as well as the full and final settlement agreement above received fully realized the loan amount or claim herein.
  - ix. By reason of the above receivership, settlement and a discharge hereof, the claim for Kshs 197,972,047.92 or any amount against the Applicant/Company forming basis of the Statutory Demand and or petition herein in oppressive, extortion, an attempt to unjustly enrich the respondent, obtain by false pretence, illegal and otherwise and abuse of the court process.
  - x. There is no debt of whatsoever amount hat is owing to the respondent by the applicant as purported in the statutory demand or petition herein claim and debt forming basis of the petition or statutory demand hereof is thus strongly and substantially disputed.
  - xi. In any event, the debt forming basis of the petition, although denied in its entirety, is statute barred by limitation of actions and the claim discloses no reasonable cause of action in law against the company.
  - xii. The petition and statutory demand forming basis thereof is otherwise an abuse of court and legal process, oppressive and vexatious against the applicant.
3. At the hearing of the application counsel for the applicant submitted that since the debt forming the basis of the Petition had been fully settled and a discharge filed, the petition was only fit for striking out.
  4. It was also submitted that the alleged debt is disputed as the loan facility agreement of 1996 was crystallized by a charge of 1997 from which the discharge arose. Counsel referred to the decision in *Synergy Industrial Credit vs Multiple Hauliers [2020] eKLR* wherein it was held that it is waste of time and abuse of the court process to sustain a petition for winding up where the debt in issue is substantially disputed.



5. It was submitted that the discharge of charge is a contract that binds the parties and that the petition attempts to amend the terms of the contract. The applicant argued that the petition is a debt collection scheme through extortion in furtherance of abuse of the court process.
6. On the Statutory Notice, the applicant submitted that the same is defective as it was not served as required by the law. It was the applicant's case that the affidavit of service by one Felix Ng'ang'a Karanja does not identify the person who was served with the petition and/or Statutory Notice at the alleged registered office of the company.
7. The Respondent/Petitioner opposed the application through the replying affidavit of its Manager, Credit Management, Ms Elizabeth Peninah On'gare who states that the company is truly and justly indebted to the petitioner in the sum of Kshs 197,972, 047.92 on account of a contract for provision of banking facilities given to the company by the petitioner in the years between 1997 and 2002. She explains that sometime in the year 1996 the company borrowed the sum of Kshs 80 million from the Petitioner to enable it construct 18 town Houses on LR Nos. 209/12138 and 209/12139 which properties were charged as collateral for the debt but that the company did not repay the loan that stood at kshs 197,972,047.92 as at 28<sup>th</sup> February 2020.
8. The petitioner adds that on 15<sup>th</sup> March 1999, it took steps to safeguard its interests by appointing a Receiver under the charged properties in respect to the rents and profits therefrom. The petitioner's deponent states that the Receiver eventually sold the charged properties for the sum of khs 112.1 million which sum was not sufficient to satisfy the debt.
9. It is the petitioner's case that at no time did it accept the payment of the sum of Kshs 10 million in full settlement of the debt due from the company.
10. At the hearing of the application the petitioner highlighted the legal principles applicable to striking out of pleadings and submitted that such an action can only be taken in plain and obvious cases and only where the case is incontestably bad.
11. It was submitted that the Company/Applicant had not discharged the burden of satisfying the court that the petition is bound to fail. Reference was made to several decided cases including the case of *Yaya Towers Ltd vs Trade Bank Ltd (in liquidation) [2000] eKLR* where it was held that: -
 

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success, unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial”.
12. It was submitted that besides failure to comply with the Statutory Notice as a ground for filing the petition, the petition was also founded on 2 other separate and distinct grounds namely; under Sections 384 and 384(2) of the *Insolvency Act* (hereinafter “the Act”) which do not necessarily depend on service of Statutory Notice. The petitioner cited the decision in *Sato Properties vs Antow Trading [2020] eKLR* wherein it was held that: -
 

“The serving of the statutory demand is snot a pre-requisite for the filing of a liquidation petition on any other grounds that have been advanced in support of the petition. The success or otherwise of the petition is a question of evidence and the general principle applicable in striking out a petition is whether the petition raises triable issues. (See D. T. Dobie V Muchina [1982] KLR 1)”.



13. Regarding the validity of service of the Statutory Notice, the petitioner submitted that Section 384(1) of the Act only requires service of the notice by leaving it at the Company's registered offices. Counsel observed that all companies are, under the *Companies Act*, required to have registered offices, in which case, the company was duly served with the Statutory Notice, at its said registered offices at 3<sup>rd</sup> Floor, IPS Building, Kimathi Street Nairobi.
14. On the issue of whether the debt is undisputed, the petitioner submitted that it had presented ample evidence to show that the debt has been outstanding for 20 years or so during which period, neither the Company nor its directors had made any efforts to discharge it. It was submitted that the Company is dormant and has no place of business for 20 odd years.
15. The petitioner noted that at no time, prior to the presentation of the Petition, did the company contest the debt and that the Director has not pointed out any improperly debited item in the statement of account.
16. It was the petitioner's case that the instant application is supported by evasive affidavits of a Director who did not disclose her residential address, the address of the Company's registered office or indicate if she filed a return of Directors as required by law, which would disclose such address.
17. The petitioner submitted that the wording of Discharge leaves no doubt that payment of Kshs. 10 million was made on account and adds that there is not a word anywhere in the document which states that payment was accepted in full and final settlement. It was submitted that the Company does not even have a semblance of a defence to the demand made in the Statutory Notice and that its objection is not only misconceived but also spurious.
18. The Petitioner maintained that in order to get the relief sought, the Company must demonstrate that it is solvent, which is not the case as the applicant did not deny that the debt remains unpaid for almost 20 years, during which period, the Company has been dormant. It was submitted that since it was not disputed that the Company is not commercially viable, its opposition to a liquidation order is hollow.
19. The petitioner held the view that since it is ex facie apparent and admitted that the Company has been dormant for period close to 20 years, on this ground alone the Court can, at the hearing of the Petition, liquidate the Company under Section 424(1)(c) of the Act.
20. I have carefully considered the pleadings filed herein and the parties' submissions together with the authorities that they cited. The main issue for determination is whether the applicant/Company has made out a case for the striking out of the Statutory Demand and Petition.
21. The applicant seeks the striking out of the Statutory Demand on the basis that the same is defective and was not served on the Company who has had no place of business for the last 20 years. The applicant argued that the alleged recipient of the Demand, one Salim Manji, was neither a director nor a shareholder or officer of the Company.
22. In a rejoinder, the Petitioner argued that the Petition is not only founded on the Statutory Notice but is also brought under Sections 384 of the *Insolvency Act* which does not require service of Statutory Notice.
23. It is trite that service of the written statutory demand is a pre-requisite for the presentation of a liquidation petition under section 384(1)(a) of the *Insolvency Act* which states 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;

24. *In Re Kipsigis Stores Limited [2017] eKLR*, the court held that the *Insolvency Act* does not specify that service must be effected upon a director or officer of the Company and that it is enough if the Notice is left at the Company's registered offices. In this case, Onguto J., appreciated the fact that the Company may not be carrying on business at the registered office. The court observed that: -

“(31) In my view, it is a pure question of fact whether service has been effected. By service must be meant the obligation to do all that is reasonably practical to bring a statutory demand to the debtor's attention. A Company may change its registered offices. A Company may actually principally conduct its business elsewhere. Where there are enough attempts to trace the Company's registered offices, where all the steps do not lead to fruition, then the court ought to appreciate and acknowledge that service at a place other than the registered office will suffice. This will be satisfied on a balance of probabilities with the purpose being to ensure that spurious applications intended to merely delay proceedings are weeded out.”

25. In the instant case, it was not disputed that the Company has been dormant and out of business for at least 20 years prior to the filing of this Petition. It was further not disputed that the Company has no known place of business, has not filed annual returns for over 20 years and that according to the records kept at the Registry of Companies, the Company's registered office is at 3<sup>rd</sup> Floor, IPS Building, Kimathi Street, Nairobi. I note that the Petitioner's process server indicated that he left the Statutory Notice at the Company's said address.
26. It was also noteworthy that the Company avoided, in its deposition to state its known registered or business address. It is common ground that the address of a Company is a matter within its control and this is the reason behind the statutory requirement that the public must be notified of any changes in the address of the Company. In this case, I noted that the Company was cagey and unwilling to disclose its address thus lending credence to the Petitioner's claim that the Company has not filed the present application in good faith.
27. My finding is that, in the circumstances of this case, the Petitioner could not have been expected to effect service of the Statutory Notice on the Company in any other place other than at its registered office as stated in the Registry of Company's records. I am therefore satisfied, on a balance of probabilities, that the Company was duly served with the Statutory Notice.
28. Regarding the striking out of the Petition, the Company argued that the debt in question is disputed and that the debt arising from a charge to the petitioner by the company was fully settled by receivership of the company appointed by the petitioner. The Company further stated that a final payment of Kshs 10,000,000.00 was made on behalf of the Company/Applicant in full and final settlement of the redemption amount under the charge, which amount the respondent accepted by executing a discharge discharging the company from all liabilities under the debt including the Company's Receivership effective the date of the discharge.



29. In response, the Petitioner maintained that the company is truly and justly indebted to the petitioner in the sum of Kshs 197,972,047.92 on account of a loan it advanced to the company in the years between 1997 and 2002 to construct 18 town Houses on LR Nos. 209/12138 and 209/12139. The Petitioner claimed that the company did not repay the loan which stood at Kshs 197,972,047.92 as at 28<sup>th</sup> February 2020.
30. It was the Petitioner's case that it took steps to safeguard its interests by appointing a Receiver under the charged properties in respect to the rents and profits therefrom. The petitioner's deponent averred that the Receiver eventually sold the charged properties for the sum of Kshs 112.1 million which sum was not sufficient to satisfy the debt. The Petitioner denied the claim that it accepted the payment of the sum of Kshs 10 million in full statement of the debt due from the company.
31. The question which the court has to grapple with is whether it should strike out the Petition. It was not disputed that the Company obtained a loan facility from the Petitioner and that if failed to service the loan thereby resulting in the Company being placed under receivership. The Petitioner's case was that the sale of the charged property did not realize enough funds to settle the debt which it claims still stands at the sum of Kshs. 197,972,047.92.
32. The Company, on the other hand, maintained that it fully settled the debt through a final payment of Kshs. 10 Million which the Petitioner accepted by executing a discharge. The rival arguments presented by the parties herein paint a scenario of an alleged debt that is disputed.
33. My finding is that the success or otherwise of the petition is a question of evidence which can only be determined after hearing the parties. I also find that the general principle applicable in striking out a petition is whether the petition raises triable issues (see *D. T. Dobie and Company (Kenya) Limited v Muchina [1982] KLR 1*). Furthermore, the Petitioner alleged that the Company is commercially insolvent, does not trade, lacks assets and, in the circumstances, may be liable to be liquidated on those grounds. The Company has not controverted these allegations. It only stated that it fully settled the debt. My take is that all the issues surrounding the alleged debt are matters that the court will take into account when hearing the petition. I find guidance in the decision in *Prideinn Hotels and Investments Limited vs Tropicana Hotels Limited MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR* where the court held that: -

“(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.”

34. Courts have also taken the position that they will not readily strike out pleadings and that the principles applicable in civil proceedings apply to liquidation petitions. This is the position that was adopted in



*Brahmbhatt vs Dynamics Engineering (1986) KLR 133*, where the Court of Appeal expressed the view that: -

“In an application to strike out a winding up petition, the Court should consider whether on evidence, it is plain and obvious case for striking out and whether the petition was bound to fail”

35. In *Co-operative Merchant Bank Ltd. v George Fredrick Wekesa Civil Appeal No. 54 of 1999* the Court held:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

36. I find that the instant petition cannot be said to be entirely frivolous. I therefore decline to strike it out considering that the court may, after hearing the petition, still come to a different conclusion and refuse to liquidate the Company given the powers of the court under section 427(1) of the [Insolvency Act](#).

37. Consequently, I find that the application dated 29<sup>th</sup> September 2020 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the Petition.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16<sup>TH</sup> DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Litoro for the Company/Applicant

No appearance for Respondent.

Court Assistant: Margaret

