



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO. E157 OF 2019

AFRICA REIT LIMITED.....COMPANY/APPLICANT

VERSUS

CHINA NATIONAL AERO TECHNOLOGY INTERNATIONAL

ENGINEERING CORPORATION.....PETITIONER /RESPONDENT

RULING

1. Through the application dated 22nd August 2019, the applicant/company herein seeks orders, inter alia, to strike out the winding up petition dated 5th August 2019 for being an abuse of the due process of court and for failure to comply with the requirements of a statutory demand notice. The applicant also seeks orders for temporary injunction to restrain the petitioner from advertising the petition herein.
2. The application is supported by the affidavit of the applicant's director, **Joyce Wanjiru Ndungu**, and is premised on the grounds that the petitioner has not complied with the statutory procedure governing liquidation including compliance with a proper statutory demand notice.
3. The applicant states that the respondent had already entered into a settlement agreement for the settlement of the debt partly by selling one acre portion of land to be sub-divided from title number Dagoretti/Mutuini/74 and part cash payment which the respondent has received. The applicant contends that it is able and willing to pay the debt through the transfer of the said property to the respondent as agreed or through proceeds of its sale. It is the applicant's case that the Companies Court should not be used as debt collecting agency or as a means of piling pressure on the Company.
4. The applicant avers that the gazettment and advertising of the petition would have adverse and catastrophic effect on the applicant as other creditors may seek to recover monies due to them, thus bringing the applicant to its knees and destroying its reputation among its business partners.
5. At the hearing of the application **Miss Achieng**, learned counsel for the applicant, submitted that the petitioner did not comply with the requirement of provision of Section 384(1) (a) of the Insolvency Act which stipulates that statutory demand notice be made by the creditor and not its advocate as was the case in the instant petition. For this argument, counsel cited the decision in the case of **Lorna Amimo v Ruke Engineering Works Limited** [2019] eKLR wherein it was held that:

“It does not take much imagination to realize that notice, which was served by an advocate not the creditor, failed to meet the parameter of Section 384 (1) (a) of the Insolvency Act.”
6. Counsel further submitted that winding up proceedings are not purposes of deciding disputed debts. Counsel cited the decision on **Re Spencor Kenya Limited** [2016] eKLR wherein it was held that winding up proceedings are not for deciding disputed debts which parties were still negotiating even after the proceedings were filed.
7. Counsel argued that the Company has various assets and money which it could apply to settle the debt.
8. The respondent/petitioner opposed the application through the replying affidavit filed on 3rd October 2019 wherein it states that it was contracted by the Company to construct serviced apartments on LR No. 1/884 of Dennis Pritt Road Nairobi for the contract sum of Kshs 190 million. It states that it performed the contract to completion in 2014 when the outstanding sum due to the petitioner was 68 million as shown in the Settlement Agreement wherein it was agreed that the outstanding sum was to be paid within 24 months.

9. It is the petitioner's case that the outstanding undisputed sum of Kshs 60 million has been the subject of various correspondence since 2014. Counsel submitted that one acre piece of land offered by the company does not belong to the applicant.

10. At the hearing of the application **Mr. Mugisha**, learned counsel for the respondent/petitioner submitted that an advocate acting on behalf of the company is competent to serve a statutory notice. For this argument, counsel cited the case of *Kitmin Holding v Noble Resources International Pte Limited* [2018] eKLR.

11. Counsel submitted that having properly served statutory notice upon the Company, which notice was acknowledged, the petitioner was well within its rights to move the court to coerce the Company to pay the debt. It was submitted that it was not fair for the company to hold the petitioner's funds for over 5 years without any remorse.

Analysis and determination

12. I have carefully considered the application dated 22nd August 2019, the respondent's response and the parties' submissions together with the authorities that they cited. The main issues for determination are:

a. Whether the petition is defective for non-compliance with the statutory demand notices.

b. Whether the debt is disputed.

c. Whether the company has failed to comply with the Debt Settlement Agreement.

13. On the issue of the validity of a statutory notice issued by an advocate on behalf of the client, I note that courts have severally held that an advocate acting on the client's instructions is competent to issue statutory notices. This was the position adopted in the case of *Kitmin Holding v Noble Resources International Pte Limited* (supra) wherein it was held:-

"...The notice issued under section 384(1) of the Insolvency Act is similar to the notice that was required by Section 220 (a) of the Repealed Companies Act. In this regard I accept the correctness of the following statement by Azangalala J.(as he then was) in Re The Prime Outdoor Network Limited [2005] eKLR, "In my view an advocate acting on the instructions of a company is competent to issue a notice under Section 220(a) of the Companies Act. The validity of the demand in my view may be challenged by the instructing company but a debtor cannot defeat a petition on the basis that a demand was made by an advocate whose authority is not challenged". The statement would hold true for a notice under Section 384(1) of the Insolvency Act. In issuing the notice, the advocate acts as an agent of the client..."

14. A similar position was adopted in *Printwell Industries Ltd v East African Educational Publishers & Another* [2018] eKLR.

15. My further finding is that while counsel for the applicant cited authorities to show that the statutory notices issued by an advocate on behalf of their client did not meet the requirement of Section 384(1) of the Insolvency Act, I respectfully disagree with such a position. I find that the fiduciary relationship that exists between advocates and their clients entitles advocates to act on behalf of their clients in issuance of statutory notices in many instances including under the Land Act in instances of exercise of statutory power of sale of charged property.

16. I therefore find that the statutory notice issued by the advocate in this matter was proper and met the threshold set under Section 384(1) of the Insolvency Act which stipulates that:

(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 debtor to secure or compound for it to the reasonable satisfaction of the creditor;

(b) if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or2015**The circumstances in which a company is un able to pay its debts.**

(c) if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.

(2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).

(3) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).

17. My take is that the statutory demand notice issued by the respondents advocates and acknowledge by the applicant served its purpose of notifying the applicant of the intended insolvency action against it and the applicant cannot turn around and challenge the notice in this application.

18. Turning to the issue of whether or not the debt in question is disputed I note that it was not disputed that the parties herein executed an Acknowledgement of Debt Agreement for the outstanding sum of Kshs 60,074,550 which agreement the applicant did not honour.

19. The applicant however claimed that the Settlement Agreement was executed by them under pressure to handover the apartments units to the purchasers. My finding is that no material was placed before this court to show that the respondent pressurized the applicant to concede to the outstanding debt. I further find that the applicant is not very candid about its claim on pressure to execute the Acknowledgement of Debt Agreement as while on one hand it claims that the document was executed under pressure, in the same breath, it concedes that it has offered one acre of land towards the settlement of the debt.

20. It was also not disputed that it has been 5 years since the Settlement of Debt Agreement was executed and that the applicant has not made any efforts to make good the respondent's claim thereby leaving the respondent with no option but to seek the court's redress through the instant petition. It is also notwithstanding that the applicant has not made any efforts to settle the outstanding debt even after the filing of this petition.

21. This court is of the humble view that in the circumstances of this case, the applicant has not approached this court with clean hands and is therefore not worthy to be granted the equitable relief for orders of temporary injunction sought in the instant application.

22. Consequently and having regard to the findings that I have made in this ruling. I find that the application dated 22nd August 2019 is not merited and I therefore dismiss it with costs to the respondent/petitioner.

Dated, signed and delivered in open court at Nairobi this 30th day of January 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Onyango for Miss Achieng for company applicant

Mr. Mugisha for respondent/petitioner

Court Assistant – Sylvia