



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**IN THE MATTER OF THE INSOLVENCY ACT NO. 18 OF 2015 LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE INSOLVENCY (AMENDED) REGULATIONS, 2018**

**INSOLVENCY PETITION NO. 1 OF 2019**

**INSOLVENCY PROCEEDINGS AGAINST GLOBAL TRUCKS LIMITED**

**GLOBAL TRUCK LIMITED.....DEBTOR/APPLICANT**

**VERSUS**

**BORDERLESS TRACKING LIMITED.....CREDITOR/RESPONDENT**

**RULING**

1. Borderless Tracking is the petitioner. The petitioner has petitioned for liquidation of Global Trucks Limited (the company)
2. The company has sought by Notice of Motion to set aside the 21 days statutory notice issued under the provisions of Section 384 of the Insolvency Act. That section provides:

***“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; (emphasis added)”***

3. The company seeks to set aside the 21 days statutory notice on the basis that it has raised several invoices against the petitioner for extra charges which it said it incurred. According to the company the counter claim/set off is greater than the debt claimed by petitioner.
4. I have looked at the annexed documents attached to the company’s application and annexed to the replying affidavit of Ariane Yvette Karangwa and I must admit that it is not clear, the debt claimed by the petitioner is without controversy. The claim of the petitioner is one that should be subject of civil litigation where parties will testify and be subjected to cross examination. It is not suitable for insolvency action. A case in point is **Mati General Contractors Limited v The Kenya Power and Lighting Company Limited (2001) LLR 4837 (CAK)** the court stated that:

***“It is thoroughly settled now that, on a petition to wind up, no order can be made until the debt is proved, where there is a bonafide dispute, as to its existence. But if a man will present a petition to wind up when he has distinct notice that the debt is disputed, and the circumstances show that it is bonafide disputed, and also when he knows that the Company is solvent, if he will have recourse to this vexatious mode of proceeding, I can entertain no doubt that the duty of the Court, under those circumstances, would be, not to suspend the petition, but absolutely dismiss it, with costs. And my opinion is, that this Court ought not, and I think will not at all events, I will not until I am controlled by higher authority permit the procedure under the winding up Act to be made the vehicle of oppression.”***

5. But perhaps the greater reason why the statutory 21 days notice should be set aside is because it does not conform to section 384(1) of the Insolvency Act, reproduced above. The format of a statutory notice was discussed in two cases.

6. The first case is **In re Kipsigis Store Limited (2017) eKLR** it was stated:

*“34. There is no doubt and it needs no repeating that the liquidation of a Company is a serious and draconian step which dictates that all the procedural prerequisite steps are complied with, and substantively for that matter: see Kenya Cashewnuts Ltd –v- National Cereals & Produce Board [2002] 1 KLR 652 and also Cruisair Ltd –v- CMC Aviation Ltd (No. 2) [1978] KLR 131. Where therefore an invalid statutory demand is served upon the debtor, the liquidation Petition if filed will be a still-born.*

35. In **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” (footnotes omitted).”*

7. The second case is **BLUELINE PROPERTIES LIMITED V MAYFAIR INSURANCE COMPANY LTD [2019] eKLR** thus:

*“38. Before concluding my discussion I need to address the submission of Mayfair that the statutory notice served upon it by BlueLine’s Advocate was null and void. Mayfair relied on Section 384 (1) (a) of the Insolvency Act and submitted that the Statutory Notice should have been issued by BlueLine. That Section provides:*

*“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.”*

39. That Section requires the Statutory Notice to be issued by a creditor. A creditor is defined under section 2 of that Act as:

*“includes a person entitled to enforce a final judgment or final order.”*

40. That definition does not include an agent, such as an advocate. A creditor on the facts before Court would be BlueLine, not its advocate. It follows, as rightly submitted on behalf of Mayfair, that the Statutory Notice issued to Mayfair did not meet the threshold set out in Section 384 (1) (a) of Insolvency Act. BlueLine was therefore not entitled to rely on the Statutory Notice issued by its advocate to seek liquidation of Mayfair. It follows that without that Statutory Notice BlueLine is unable to prove that Mayfair is unable to pay its debts.”

8. In this case the statutory notice was signed by the Deputy Registrar of this court, contrary to statute. That notice is not valid to mount up a petition for liquidation of a company.

9. As a result of the above finding this petition is struck out with costs to the company.

10. The company is awarded costs of the Notice of Motion.

**Orders accordingly.**

**DATED, SIGNED and DELIVERED at NAIROBI this 27<sup>th</sup> day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this 27<sup>th</sup> day of **April, 2020.**

**MARY KASANGO**

**JUDGE**