REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

INSOLVENCY PETITION NO.07 OF 2019.

KWALE INTERNATIONAL

SUGAR COMPANY LIMITED..DEBTOR/APPLICANT

VERSUS

EPCO BUILDERS LIMITED...............................PETITIONER/RESPONDENT

CATHOLIC ARCH DIOCESE OF MOMBASA.....CREDITOR/RESPONDENT

SOUTHERN ENGINEERING

COMPANY LIMITED...CREDITOR/RESPONDENT

RULING

1. Through the application dated 22nd October 2019, the Debtor/Applicant seeks the following orders:

1. Spent

2. The statutory demand from the respondent dated 7th June 2019 and served upon the applicant on 12th June 2019 be set aside.

3. A declaration be issued that Nairobi Insolvency Petition No. 07 of 2019 is null and void ab initio, and hence be struck out and/or dismissed with the costs to the applicant.

4. The Honourable court be pleased and do hereby grant an order of mandatory injunction compelling the respondent to recall the malicious advertisement of the purported illegal Insolvency Petition, Nairobi Insolvency Petition No. 07 of 2019 published in the Daily Nation Newspaper of 8th July 2018 at page 44 and republished on the same Daily Nation Newspaper of 22nd October 2019 at page 27 and publish an apology in the same manner in which it published the malicious advertisement of the purported Insolvency Petition.

2. The application is supported by the supporting affidavit and further affidavit of the applicant's Director **Mr. Harshil Kishore Kotecha** sworn on 22nd October 2019 and 22nd November 2019 respectively.

3. The applicant's case is that through a contract dated 30th April 2012, (hereinafter **"the contract"**) the respondent agreed to undertake construction works services for and on behalf of the applicant which contract spelt out the terms and conditions, the rights and obligations of the parties thereto but that a dispute of what is due and payable to the respondent for the works done arose way back in mid 2015 thus causing the respondent to threaten to suspend the construction works.

4. The applicant contends that the Clause 20.2 of the contract provides for settlement of disputes through arbitration and that parties had been engaging in mutual consultation in a bid to resolve their dispute.

5. The applicant accused the respondent of failure to properly perform some works, failure undertake accounts reconciliation in order to have a consensus on the figures thereby causing delays in the processing of the payments. It is averred that in total disregard to the reconciliation and accounting factors, the respondent went ahead to raise a purported bill allegedly due for payment but that after interrogating and analyzing the bill through M/S Adventist Inhouse Africa Limited, a number of items were flagged down. It is stated that the respondent

objected to the analysis by the said consultant and that a dispute as to what is owed and a possibility of a counterclaim, set off or cross demand which equals or exceeds the alleged amount of debt has arisen. The applicant therefore states that the demand notice ought to be set aside pursuant to Regulation16 (1) of the Insolvency Regulations.

6. The applicants deponent states that on 15th February 2019 the respondent shockingly and unilaterally purported to raise a bill worth 652,566,332.84 without due process, proper verification and certification by the relevant parties including the Engineer, Lenders Technical Advisor and/or project consultant yet it was clear that the parties failed to resolve such dispute or difference by mutual consultation.

7. He states that in further absurdity, the respondent purported to issue an illegal, invalid, irregular and unenforceable statutory demand dated 7th June 2019 which demand he contends is premature null and void in both form and substance. It is the applicant's case that the commencement of the insolvency proceedings against the applicant is only intended to blackmail and embarrass the applicant so as to ruin its business and reputation.

8. The applicant further states that having filed an application herein on 1st July 2019, under Regulation 16(2) of the Insolvency Regulation 2016 (hereinafter **" the Regulations"**), the time limited for compliance with the purported statutory demand ceased to run on 1st July 2016 and would only resume upon the dismissal of the said application. It is thus the applicant's position that the respondent is prohibited from filing this petition which it states, was maliciously filed on 5th July 2019 and advertised on 8th July 2019.

Applicant's submissions.

9. At heating of the application, **Professor Ojienda SC** submitted that the Insolvency Petition herein is null and void ab initio and should therefore be struck out. He submitted that under Regulation 15(3) of the Insolvency Regulation, the petition should be preceded by a statutory demand and shall be in form 6 set out in the First Schedule.

10. Counsel noted that under the said schedule, a statutory notice must be filed in the high Court, and be given a number, must be endorsed by the Deputy Registrar and be issued under the hand of the alleged creditor and not its advocate, pursuant to the provisions of Section 384 of the Insolvency Act(hereinafter **" the Act"**). For this argument counsel cited the ***Kipsigis Stores Ltd*** [2017] eKLR wherein it was held that a statutory demand must be substantively compliant. It was submitted that since the statutory notice was never filed and endorsed by the court Registrar, the same did not have the force of law and only amounted to a mere demand letter by an advocate.

11. It was submitted that there is a dispute as to the amount allegedly due and further, that there is a cross demand by the applicant. It was the applicant's case that in view of the fact that the contract provides for how a dispute on the amount due ought to be resolved at Clause 20 thereof, parties are obligated to first consult themselves and agree on the contentions issues failure of which the dispute can be subjected to arbitration.

12. Counsel contended that contrary to the established process, the contractor unilaterally raised an exaggerated bill without even a site visit and verification by the project engineer yet it is possible that there would have been areas that need replacement/rectification at the contractor's cost hence necessitating a set off and/or cross demand.

13. It was submitted that it is trite law that a company cannot be wound up or liquidated if the alleged debt is disputed in good faith and on a substantial ground. For this argument counsel relied on the decision in ***Re Genghis Capital Limited*** [2019] eKLR wherein it was held:-

> "***The jurisprudence of winding up of companies, now referred to as insolvency, is that orders of Liquidation of a company cannot be issued when the debt is disputed. This is what the learned author of Halsbury's Laws of England, 4th Edition stated viz:***
>
> "***A winding up order may not be made on a debt which is disputed in good faith by the company; the court must see that the dispute is based on substantial."***

14. It was submitted that the Insolvency Petition herein and the subsequent newspaper advertisement was premature, malicious, offends Regulations 16(2) and is thus a nullity as the time for the filing of the application to set aside the statutory demand under Regulations 16(1) (a) had not lapsed as at the time the petition was filed. It was thus submitted that the respondent acted maliciously by filing the petition on 5 th July 2019 and posting the advertisement on 8th July 2019 when it had already been served with the application to set aside the statutory demand on 3rd July 2019 being Nairobi Miscellaneous Application No. E272 of 2019.

15. It was further submitted that the applicant has suffered and continues to suffer irreparable damage in its business operations and associations with its business partners who are now reluctant to advance it loan facilities due to the false impression created by the respondent that it was insolvent.

16. On the respondent's claim that procedure adopted by the applicant in filing the application, being Regulations 16 and 17, only applies to insolvency of natural persons not juristic persons, and that part X on Liquidation of Companies should be the applicable provisions, counsel submitted that the said Part X of the Insolvency Regulations 2016 makes no provision for statutory notice in which case, the statutory notice issued by the respondent herein ought to be struck out.

17. Counsel submitted that Section 17 of the Act, on which the instant application is also anchored makes provisions for bankruptcy application by creditors but does not define or limit the nature of the debtor/creditor. It was submitted that the instant application is to set aside a purported statutory notice under Regulation 15(1) of the Regulations and that the application is properly before the court.

18. It was further submitted that an application to set aside a statutory demand is provided for under the Section 17 of the Act and Regulations 16 and 17 of the Regulations which provisions do not stop any of the alleged creditors from instituting separate insolvency proceedings.

The petitioner/respondent's case.

19. The respondent opposed the application through the Notice of Preliminary Objection dated 5th November 2019 wherein it listed the following grounds:-

> ***a) That this honourable court is divested of the requisite jurisdiction to hear, make any orders in respect of and/or determine the said application on the grounds that:***
>
> ***i. The application is statutorily untenable and unsound as it is anchored on statutory and Regulatory provisions whose application and relevance is exclusively limited to proceedings in respect of Bankruptcy of Natural Persons/Personal Bankruptcy and not to juridical persons/ Liquidation of Companies.***
>
> ***ii. That the said provisions (Regulations 16 and 17 of the Insolvency Regulations 2016) without an iota of doubt govern proceedings in respect of Personal Bankruptcy as provided under Part V of the Insolvency Regulations 2016 whilst Regulations of Companies is properly and exclusively provided for under PART X of the Regulations.***
>
> ***iii. That to the extent that the applicant invites this Honourable court to issue orders on the misapprehended and misapplied Regulations, this court lacks jurisdiction which is a trite principle MUST emanate from statute.***
>
> ***iv. That insolvency proceedings are PUBLIC PROCEEDINGS in nature affecting rights in rem, including but not limited to those of the CATHOLIC ARCHDIOCESE OF MOMBASA and SOUTHERN ENGINEERING COMPANY LIMITED and as such determining the same at this interlocutory stage without the consideration and substantive hearing of the said creditors case would not only be ultra vires and prejudicial to the said creditors but also in blatant disregard to their right to fair hearing as enshrined under Article 25(c), 48 and 50 of the Constitution of Kenya 2010.***

20. The respondent also opposed the application through the replying affidavit of its Managing Director **Ramji Devji Varsani** dated 5th November 2019 who denies the allegations made in the application and supporting affidavits and states that Adventis Inhouse Archtects were merely retained to interrogate the bill raised by the respondent and that they were in fact the project architects who together with the consultants, were tasked with the assessment, evaluation and certification of works done on behalf of the applicant (hereinafter **" the company "**) from the commencement thereof until completion.

21. He states that the application is filed by the applicant is nothing but a gambit with the intended goal of subterfuge to mislead this court and ultimately deprive the creditor of its hard earned proceeds and to evade the meritorious liquidation proceedings before this court. He contends that the creditor has clearly and conclusively proved that the Debtor/ Applicant (hereinafter referred to as **"the Company"**) is indebted to the creditor to the tune of Kshs 712,481,950.65/= inclusive of compound interest at the rate of 3% per annum above the discount rate of Central Bank and that the said amounts have not only been certified but also severally acknowledged by the Company expressly and by conduct.

22. He avers that although **J. P. Murkherji & Associates** were included in the contract as Engineers, their involvement in the project, as was mutually agreed and understood by the parties, was merely for good will and was very minimal considering that they were based in India. He adds that for all intents and purposes, the Architect and Quantity Surveyor conclusively represented the Company in the said contract in performing the duties of evaluation and certification of works completed as per the contract.

23. He states that pursuant to the contract, the creditor commenced and completed the construction works after which it submitted various invoices for payment against certificates of payment number 19, 20, 21, 23, 24, 25 and 02&F (Jaggery) that were issued and certified by the Quantity Surveyor, the Architect and the project Engineer as follows:

> *a. Certificate Number 19 for payment of kshs 86, 868, 032.92*
>
> *b. Certificate Number 20 for payment of kshs 71, 494, 119.08*
>
> *c. Certificate Number 21 for payment of kshs 78, 703, 771.05*
>
> *d. Certificate Number 23 for payment of kshs 17, 298, 566.96*
>
> *e. Certificate Number 24 for payment of kshs 97, 571, 702.04*
>
> *f. Certificate Number 25 for payment of kshs 46, 492,306.10*
>
> *g. Certificate Number 02&F (Jaggery) for payment of kshs 7,959,203.32.*

24. He avers that the amount owing to the creditor was duly evaluated, valued, approved and certified for payment by the quantity surveyor, Architect, project Engineers and the company respectively as provided under Clause 14(specifically clause 14.3, 14.7) of the contract.

25. He asserts that there exists/existed no dispute whatsoever as to the indebtedness by the company nor of the amounts owed and adds that the company has craftily and deliberately withheld critical information and correspondences in a bid to create and propagate a non-existent dispute.

26. He states that upon the receipt of their invoices dated 6th May 2015 (annexure **"RDV-2"**), the company vide its letter dated 30th June 2015 (annexure **"RDV-4"**), acknowledged the validity and certification of the interim payment certificates presented and further acknowledged indebtedness as stated in the said certificates which debt it undertook to settle by 10th July 2015. It is therefore the respondent's case that they were justified to suspend the works owing to the nonpayment of duly assessed and certified payment certificates.

27. He maintains that it is manifest that the company is unable to pay its debts and or meet it obligation to the creditor in respect of the sum of Kshs 712,481,950.65/- as shown in annexure **"RDV-17". Respondent/petitioners submissions**

28. At the hearing of the application **Mr. Okwatch,** learned counsel for the respondent, submitted that this court lacks the jurisdiction to hear and determine the instant application in view of the inapplicability of Regulations 16 and 17 of the Insolvency Regulations which relate exclusively to insolvency proceedings in respect to Personal Bankruptcy as Liquidation of Companies are provided for under Part VI of the Act.

29. It was submitted that the Act and Regulations rightly distinguish the process of Personal Bankruptcy and Corporate Liquidation as two distinct processes involving incomparable entities. It was the respondents position that misapplication of the Regulations of Personal Bankruptcy to Corporate Liquidation amounts to unlawful arrogation of jurisdiction through craft of interpretation. For this argument counsel relied on the decision in ***Blue Line Properties Ltd v Mayfair Insurance Company Ltd*** [2019] eKLR wherein it was stated:

> ***"In this regard I wish to respond to the petitioner's submission that the court would not be guided by Regulation 17(6) (b) of Insolvency Regulation 2016. That regulation 17 only applies to personal bankruptcy matters. It does not apply to liquidation of a company as this present matter. I therefore do not have to consider if the debt is disputed on grounds that are substantial. That does not apply to this matter"***

30. It was further submitted that insolvency proceedings are public in nature as they involve the rights of all the other creditors of the company thus explaining the requirement for an advertisement of the Insolvency Petition to inform all the other existing creditors that the company is facing insolvency so as to enable them to participate in the matter. It was thus the respondent's case that terminating the petition at this stage, without considering the interests of the other creditors will be prejudicial to their right to fair hearing. It was submitted that it will be an exercise in futility to recall the advertisement.

31. For this argument counsel cited the decision in ***Re Pride Inn Hotels & Investments Ltd*** [2017] eKLR wherein it was held:-

> ***"31. Now that the advert has been made and consumed by the public, I don't consider it effective or of any benefit to make any order staying the advert or ordering an apology. One cannot stay what has happened."***

32. On whether the statutory demand should be set aside for want of form, counsel submitted that equity dictates that substance must be emphasized over form. It was further submitted that the purported Form 6 that the applicant alleges to be the Form for a Statutory Demand Notice is clearly the prescribed Form for Personal Bankruptcy proceedings and further that the claim that the Notice is a nullity for having been signed by the advocate and not the petitioner is misguided.

33. On whether the debt is disputed, it was submitted that the applicant company had on several occasions unequivocally admitted and/or acknowledged its indebtedness to the respondent and that it was therefore absurd for the company to deny the debt more than 3 years at the completion of the contract and after making substantial payments in respect of certificates issued by the Project Architect. Counsel argued that it is well- settled that the company is stopped from disowning the authority and validity of certificates issued by the Architect when it not only ratified the same, but also failed to correct the position (if any correction existed) when it had the opportunity to do so before reliance on the same by the petitioner. Reliance was placed in the decision in ***Weston Contractors Limited v Kenya Ferry Services*** [2014] eKLR wherein Kasango J. observed:

> ***"Having procured the plaintiff's services fairness required that the defendant would pay for these services when the certificates were issued by the defendant's own appointed Architect and confirmed by the defendant's own appointed quantity surveyor. It was unjust to delay such payment and to refuse to pay interest for the delayed payments."***

34. Counsel maintained that it is beyond reasonable doubt that by issuance of the interim payment certificates by the project consultants pursuant to the contract and further by the numerous unequivocal express and implied acknowledgments of indebtedness by the company, there existed/exists no dispute as to the fact that the company is indebted to the respondent for the works done and certified. Reference was made to the decision in ***East African Portland Cement Company Ltd v Kom Stockist Ltd*** [2008] eKLR wherein it was held:-

> "***I am satisfied, and I do hold, that the defendant acknowledged the debt owed to the plaintiff and that it went ahead to pay part of this debt. It cannot be heard to deny that any contractual agreements or business arrangements existed between the two parties. In the face of an acknowledgment of the debt and the part payment of the same, the defendant cannot be said not to have any reasonable defence to the plaintiff's claim."***

35. It was further submitted that there exists/existed no disputed necessitating the activation of the dispute resolution process in the contract for the reason that the works were completed by the petitioner and that the debt not disputed. Reference was made to the decision in ***Kitmin Holding Ltd v Noble Resources International Pte Ltd*** [2018]eKLR wherein the court held:

> ***"15. The simple answer to this argument would be that the court's finding that the plaintiff has not demonstrated, on a Prima Facie basis, that the debt is disputed has to be a finding that it has not demonstrated that it has a Prima Facie case with probability of success worth of submission to Arbitration. As a corollary the mere existence of this Alternative Dispute Resolution cannot defeat the Notice issued."***

36. Counsel argued that as a prerequisite to the activation of the arbitration clause, there must be a substantial dispute as contemplated in the contract. He added that since there is no dispute whatsoever that would amount to a contractual dispute, the company is merely attempting to create the illusion of a dispute to escape liability. It was also submitted that even where a debtor contests the amount of debt but does not deny the indebtedness the same cannot warrant the setting aside of a statutory demand notice nor does it invalidate the insolvency proceedings.

Analysis and determination

37. I have carefully considered the application dated 22nd October 2019, the respondent's response and the submissions made by the parties' advocates together with the authorities that they cited main issues for determination are as follows:-

> ***a) Whether this court has the jurisdiction to entertain the petition.***
>
> ***b) Whether the statutory demand notice should be set aside.***
>
> ***c) Whether the debt is disputed.***
>
> ***d) Whether the petition is premature.***
>
> ***e) Whether the advertisement should be recalled.***

Jurisdiction/Disputed Debt

38. As was stated in the oft-cited case of ***Owners of Motor Vessel "Lillian S" v Caltex Kenya Ltd*** [1989] KLR1;

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

39. In the present case, both parties took issue with the jurisdiction of this court on two fronts. While the applicant argued that this court lacks jurisdiction to entertain the petition in view of the existence of an arbitration clause in the contract that the parties signed, the respondent claimed that Regulations 16 and 17 of the Insolvency Regulations, under which the instant application is anchored, relates to bankruptcy proceedings in respect to natural persons and not to Corporate Liquidation.

40. The respondent argued that the misapplication of the said Regulations amounts to unlawful arrogation of jurisdiction. The question which then arises is whether this court has jurisdiction to hear and determine the respondent's petition/applicant's application.

41. On the existence of an arbitration clause, I note that clause 20.2 of the parties' contract stipulates as follows:

> ***"Disputes shall be adjudicated by a DAB in accordance with Sub- Clause 20.4 [Obtaining Dispute Adjudication Board's Decision]. The parties shall jointly appoint a DAB by the date stated in the Appendix to Tender.***
>
> ***The DAB shall comprise, as stated in the Appendix to Tender, either one or three suitably qualified persons ("the members"). If the number is not so stated and the parties do not agree otherwise, the DAB shall comprise three persons…..***

42. The applicant argued that the debt in question was a disputed debt while the respondent's position was that the debt had been acknowledged and partly paid by the applicant in which case, the same was not disputed to as to warrant its reference to arbitration. In ***Universal Hardware Limited V African Safari Club Limited***, Makhandia JA in the lead judgment for the Court of Appeal observed that:

> ***"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"***.

43. Guided by the above decision, I will now turn to consider the respondent's claim that the debt is not disputed owing to the applicant's own acknowledgment of the debt through annexures **"HKK2 and 3"** to the applicant's affidavit. The respondent demonstrated that at the request of the company, it agreed to undertake construction and building works at the sum of Kshs 2,220,000/= and that pursuant to the contract, it performed its obligations, completed the works after which it submitted various invoices for payment against certificates of payment Nos. 19, 20,21, 23, 24,25, and 02&F(Jaggery) as shown in the respondents replying affidavit. It is the respondent's case that through the applicants letter dated 30th June 2015, the applicant acknowledged the validity and certification of the interim payment

certificates presented and further acknowledged indebtedness. The said letter was attached to the respondents replying affidavit as annexure **"RDV4".** A perusal of the said letter shows that through it, the applicant confirms to the respondent that the outstanding balance is Kshs 195,253,946.88 and states that they seek approval of the payments after which they will advice the respondent on the payment plan.

44. The respondent also exhibited certificate of Final Completion from the project Architects (representatives of the Company) to confirm that they had fully executed their mandate under the contract.

45. The Company's case that the debt is disputed is based on the claim that the respondent did not properly perform some works and that it failed to avail itself for accounts reconciliation in order to reach a consensus on the amount due.

46. My finding is that the applicant's claim that the respondent did not properly or fully perform its obligation under the contract cannot hold in the face of the uncontested annexure **"RDV7"** which is the Certificate of Completion issued by the applicants own project Architects to confirm that the respondents had fully executed its part of the contract. Furthermore, the applicant's own letter dated 30th June 2015 (annexure **"RDV4"**) is proof of acknowledgement of debt.

47. It is therefore my finding that since the company bears the burden of establishing that the debt is not bona fide and is disputed on valid grounds, I can conclude that the debt herein is not disputed. It is clear to me that by stating that the respondent failed to avail itself for the reconciliation verification the amount due it, the applicant admits owing the debt but disputes the amount owed. Section 384 of the Act stipulates as follows:

> ***"(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 shilling or more, has served on the company, by leaving 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.***
>
> ***b) If execution or other process issued on a judgment, a Decree or Order of any court in favour of a creditor of a company is returned unsatisfied in whole or in part;***
>
> ***c) If it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due."***

48. In ***Peter Munga v African Seed Investment Fund LLC*** [2017] eKLR it was held;-

> "***58. I must for point out that overstatement or an exaggeration of the amount claimed is not stipulated as one of the grounds for setting aside a statutory demand. It would however fall under the general residue and discretionary grounds. Besides, section 17(6) of the Insolvency Act also decrees that a statutory demand will be invalidated where the debtor disputed the amount demanded and notifies the creditor of this contest on the basis that the amount has been overstated and further the notification is communicated within the statutory period of the demand.***
>
> ***59. The debtor sought to rely on this section to have the statutory demand invalidated while pointing out that the after the demand was received and prior to the expiry of 21 days the creditor was notified of the dispute as to the amount demanded. The contest was basically and substantially that an amount of US$103,672/=which was paid to the creditor on 28th September 2016 has not been accounted for in the demand.***
>
> ***60. 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.***
>
> ***61. There is additional support from the stature itself that the demand is not invalidated upon a dispute being raised by the debtor. To begin with, section 17 of the Insolvency Act must be read in its entirety and din a wholesome manner. Subsection 7 anticipates that even where there is an overstatement of the amount due, the debtor is still to comply with the statutory demand. 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"***
>
> ***62. Those provisions, which are found under subsection 7, are a clear indicator that the debtor is still expected to comply with the statutory demand not withstanding any overstatement of the debt."***

49. Similarly, in ***Bradford & Bingley P/C V Rachid*** [2006] UK HL 37 it was held that an acknowledgement of indebtedness is not confined to an admission of debts which are indisputable as to quantum as well as to liability.

50. In ***Rishul Construction v Joe K. Muchekehu*** [2001] eKLR it was held"

*"**Although the terms of the agreement in writing was not produced to the court I am satisfied that the certificates and final certificate was issued pursuant to the terms of this written agreement. In this case I hold that the final certificate issued was conclusive proof of the sum due to the plaintiff as certified by the Architect.***

……I find that the final certificate is binding on the defendant having been issued by the defendant's Architect and agent and I award the amount thereof namely kshs 224, 870, 00 to the plaintiff with interest thereon at court rates from the date of filing of the suit together with the costs of the suit."

51. Having regard to the above cited authorities, finding and observations that I have made herein above, I reiterate my finding the debt herein is not disputed. Flowing from the finding that the debt is not disputed, I find that there is no substantial dispute between the parties that would necessitate the activation of the dispute resolution process through arbitration (See ***Kitmin Holding Ltd v Noble Resources International Pte Limited*** (supra).

52. Turning to the inapplicability of Regulations 16 and 17 of the Insolvency Regulations to the present application, the respondent contended that the said regulations are only applicable to the bankruptcy proceedings in respect to natural persons and not the liquidation of a company. The said Regulations stipulate as follows.

16. Proceedings on a bankruptcy application

(1) A bankruptcy application may not be withdrawn without the approval of the Court.

(2) The Court has a general power to dismiss a bankruptcy application or to stay proceedings on such an application on the ground that the Court is of the opinion that a requirement of this Part or the insolvency regulations has not been complied with in a material respect

(3) If the Court stays proceedings on a bankruptcy application, it may do so on such terms as it considers appropriate."

17. Creditor may apply for bankruptcy order in respect of debtor

(1) One or more creditors of a debtor may make an application to the Court for a bankruptcy order to be made in respect of the debtor in relation to a debt or debts owed by the debtor to the creditor or creditors.

(2) Such an application may be made in relation to a debt or debts owed by the debtor only if, at the time the application is made —

(a)the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the prescribed bankruptcy level;

(b)the debt, or each of the debts, is for a liquidated amount payable to the applicant creditor, or one or more of the applicant creditors, either immediately or at some certain, future time, and is unsecured;

(c)the debt, or each of the debts, is a debt that the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay; and

(d)there is no outstanding application to set aside a statutory demand in respect of the debt or any of the debts

(3) For the purposes of subsection (2)(c), a debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—

(a)the applicant creditor to whom the debt is owed has served on the debtor a demand requiring the debtor to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least twenty-one days have elapsed since the demand was served, and the demand has been neither complied with nor set aside in accordance with the insolvency regulations; or

(b)execution or other process issued in respect of the debt on a judgment or order of any court in favour of the applicant, or one or more of the applicants to whom the debt is owed, has been returned unsatisfied either wholly or in part.

4. For the purposes of subsection (2)(c), a debtor appears to have no reasonable prospect of being able to pay a debt if, but only if, the debt is not immediately payable and—

(a)the applicant to whom it is owed has served on the debtor a demand requiring the debtor to establish to the satisfaction of the creditor that there is a reasonable prospect that the debtor will be able to pay the debt when it falls due;

(b)at least twenty-one days have elapsed since the demand was served; and

(c)the demand has been neither complied with nor set aside in accordance with the insolvency regulations.

(5) This section is subject to sections 18 to 20.

(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.

7. A debtor complies with a demand that overstates the amount owing 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 costs; and

(b)taking those steps within the period specified in the demand for the debtor to comply"

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

Whether the statutory demand should be set aside for want of form.

54. The applicant's case was that the statutory demand issued by the respondent was not in the proper format. Section 384(1) of the Insolvency Act stipulates as follows:

Section 384(1)The circumstances in which a company is unable to pay its debts

(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;

(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; or

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

55. Courts have taken the position that they will not set aside statutory demands on mere technicality but will have regard to all the circumstances of the case including but not limited to whether or not the debt is owed as well as whether the overriding objective would be defeated if the notice is set aside. This was the position adopted b Onguto J. in ***Re Kipsigis Stores Ltd*** [2017] eKLR wherein it was held:

"35. In Re F.M. Macharia (K) Ltd [2017] e KLR, the court with approval cited Halbury'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 he 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."

56. In the present case, besides the format of the notice, the applicant took issue with the fact that the statutory demand was signed by the petitioner's advocate as opposed to the petitioner himself in support of the argument that the notice was not valid.

57. The applicant did not however indicate how the alleged short comings in the statutory notice prejudiced its case. I am not satisfied that the reasons advanced by the applicant would warrant the setting aside of the statutory demand notice . In ***Peter Munga*** (supra) it was held;

36. Unless, substantial injustice or prejudice is to be occasioned by some technical defect or irregularity and which injustice or prejudice cannot be remedied by a court order, technical defects and irregularities should not stand in the way of adjudicating disputes. Compliance with time lines, in my respectful view falls in the realm of technical requirements unless the consequences of non-compliance are expressly stated."

Whether the petition is premature and whether the advertisement should be recalled.

58. The applicant argued that in view of the fact that the petition and the advertisement were premature, having been filed and posted before the lapse of the period provided for under the Act, the same ought to be recalled.

59. On its part, the respondent argued that it would be an exercise in futility to recall and advertisement that has already been sent and consumed by the public and, further that the courts frown upon the draconian orders of striking out of the pleadings.

60. My findings is that an order compelling the respondent to recall the advertisement posted on the Daily Newspaper of 8th July 2018 will be of no consequence and indeed an exercise in futility as the advertisement had long been consumed and probably acted upon by the members of the public. Further to the above findings on the advertisement, I find that having already been acted upon, the prayer strike out the petition and for declaration that the instant petition is null and void, in the face of the finding herein that the debt is an acknowledged would not be proper exercise of this court's discretion.

61. My finding is that the justice of this case will require that the Insolvency Petition herein be heard on its merits. Consequently, I decline to grant the prayers sought in the instant application which I hereby dismiss with orders that costs shall abide the outcome of the petition.

Dated, signed and delivered via Skype at Nairobi this 23rd day of April, 2020 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 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of;

Mr. Makokha for the applicant

Mr. Okwatch for the company/Petitioner and holding brief for Kaburu for 2nd petitioner.

Mr. Ombwayo for 3rd creditor

C/A & DR- Hon. Tanui