



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: D. S. MAJANJA J.**  
**INSOLVENCY NOTICE NO. E003 OF 2020**  
**IN THE MATTER OF THE INSOLVENCY ACT, 2015**  
**AND IN THE MATTER OF**  
**XPLICO INSURANCE COMPANY LIMITED**

**BETWEEN**

**XPLICO INSURANCE COMPANY LIMITED.....APPLICANT**

**AND**

**MUSYIMI PAUL MAINGI T/A**

**MAINGI MUSYIMI & ASSOCIATES ADVOCATES.....1<sup>ST</sup> RESPONDENT**

**MUSILI JACKSON RADFORD MBITI T/A**

**MUSILI MBITI & ASSOCIATES ADVOCATES.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Applicant (“the Company”) is licenced under the *Insurance Act (Chapter 405 of the Laws of Kenya)* while the Respondents are firms of advocates. The Respondents issued and served a Statutory Demand dated 15<sup>th</sup> May 2020 (“the Statutory Demand”) on the Company demanding Kshs. 28,473,147.00 to be paid within 21 days of service in default of which they would commence liquidation proceedings against the Company.

2. The Company filed an application dated 9<sup>th</sup> June 2020 made under **section 17(2)(d)** of the *Insolvency Act, 2015* (“the *Act*”), **Regulations 16, 17(1), 6(c) and (d) and 17(8)** of the *Insolvency Regulations, 2016* (“the *Regulations*”) seeking orders to restrain the Respondents from filing and advertising an Insolvency Petition based on the Statutory Demand and to set aside and/or vacate the Statutory Demand.

**Applicant’s Case**

3. The grounds upon which the application is based are set out on the face of the application, the supporting affidavit of the Principal Officer of the Company, Julius Mwangi, sworn on 9<sup>th</sup> June 2020 and the further affidavit of Dorcas Mwae, the Claims Manager, sworn on 2<sup>nd</sup> July 2020. The Company’s advocates also relied on written submissions in support of its position.

4. The Company contended that the Statutory Demand was incurably defective since the Respondents are not creditors of the Company within the meaning of **section 384(1)** of the *Act* as it was alleged that they issued the notice on behalf of named creditors. Counsel submitted that under **section 384(1)** aforesaid, an application for a bankruptcy can only be initiated by a bonafide creditor as defined under **section 2** as, “including a person entitled to enforce a final judgment or final order.” Counsel further submitted that a creditor does not include an agent such as the advocates and in this case, the defect was not merely one of form but of substance. Counsel cited the case of *Blueline Properties*

**Limited v Mayfair Insurance Company Limited HCOMM IP No. 12 of 2018 [2019] eKLR** to support the argument that a statutory demand signed by an agent such as an advocate is defective.

5. Mr Mwangi deponed that the Company responded to the Statutory Demand and contested its contents by its letter dated 5<sup>th</sup> June 2020 in which it disputed the amount of Kshs. 28,473,147.00 claimed on the ground that a substantial number of the matters cited had been settled. It was explained in the letter that some of the matters in respect of which the demand was made had judgments delivered in February and March 2020, a few weeks before the COVID-19 pandemic was declared hence its ability to settle the debt immediately was impacted. The letter went on to state that the Company is regulated by the Insurance Regulatory Authority and has the financial standing and ability to settle claims as and when they fall due hence it was not insolvent within the meaning of **section 17(2)(c)** of the *Act*. The Company also raised the issue that the Statutory Demand related to two law firms thus casting doubt on the competence to issue the demand on behalf of various claimants. The letter concluded that the Company was willing to undertake a reconciliation exercise in view of the substantial payments already made to the Respondents.

6. Mr Mwangi further deponed that alleged debt arises from several suits that had been litigated in various courts and some of the matters have been settled and that there is a full payment plan rendering the Statutory Demand premature, ill-conceived and an abuse of the court process. He accused the Respondents of failing to disclose that 8 out of the 19 claimants on behalf of whom the Statutory Demands have been issued have their claims settled and their files closed. Moreover, that the alleged amount is on account of **section 5(b)(iv)** of the *Insurance (Motor Vehicles Third Party Risks) Act (Chapter 405 of the Laws of Kenya)* which caps the statutory limit of the amount recoverable from the insurer at Kshs. 3,000,000.00. He also deponed that the Respondents failed to disclose and acknowledge that they had commenced execution proceedings against the Company in respect of some of the decrees forming part of the cases listed in the Statutory Demand, which execution process offends the spirit of **section 21** of the *Act*.

7. Mr Mwangi deponed that the Company was able and ready to settle any undisputed debt in monthly instalments and that it had made this offer in writing to the Respondents but the offer was ignored. He maintains that the Company is not insolvent and has in fact made substantial payment in excess of the sum Kshs. 6,778,484.00 and that the delay has been caused by the need for verification and validation of claims to guard against infiltration of the fraudulent claims which have led to the collapse of other insurance companies.

8. At present, Mr Mwangi deponed, the Company is undergoing systemic and structural reorganization and adjustments to enhance efficiency and that the Statutory Demand is intended to coerce it to settle the debt and malign its image in order to pressure it to settle the demand and that it should be struck out. The Company submitted from the totality of the evidence, it had a reasonable prospect of paying its debt as shown by the evidence of payments made by it.

#### **Respondent's Case**

9. The Respondents opposed the application through the replying affidavit sworn by Paul Maingi Musyimi on 18<sup>th</sup> June 2020 together with written submissions.

10. Mr Musyimi deponed that the Statutory Demand was done on instructions of the named creditors and their advocates and it was therefore misleading to implead the Respondents as law firms when the creditors of the Company were known. They stated that the primary purpose of the Statutory Demand is to notify the debtor of the existence of the debt and demand settlement and from the schedule attached the creditors are known and are owed Kshs. 28,813,296.00.

11. As regards the Statutory Demand, the Respondents contended that it was not defective. They submitted that every case turns on the peculiar circumstances and that any demand issued by agents of the creditors is not defective. They pointed out that in this case, the Company admitted indebtedness to named creditors hence it was aware of the debt and had even made part payment in the circumstances, it was not prejudiced at all by any defect.

12. The Respondents further submitted that the Statutory Demand is in the statutory format prescribed by the *Regulation, 2016* which contemplates involvement of a Creditor's agent. They further submitted that even if the demand was defective, such defect can still be cured by **section 696** of the *Act*. Citing the case of *Re F. M. Macharia (K) Limited HC COMM IC No. 8 of 2016 [2017] eKLR* counsel's submitted that the Statutory Demand operated as a statutory notification to the Company hence any defect which did not prejudice the Company should not be struck out.

13. The Respondents add that the steps taken by the creditors were necessitated by the Company's refusal to discharge its statutory obligation of paying insurance claims as they fell due despite demand and decrees issued against it. Mr Musyimi also deponed that auctioneers were instructed to proceed with execution on diverse dates but several decrees were returned unsatisfied showing that the Company was insolvent. The Respondents submitted that the Company's dispute regarding the debt is not unequivocal and the evidence shows that a substantial part of that amount is still outstanding.

#### **Determination**

14. From the depositions and submissions of the parties two issues fall for determination. Whether the Statutory Demand is defective and if not, whether the application should be allowed.

#### **Whether the Statutory Demand is defective**

15. The first issue for determination is whether the Statutory Demand is defective. The Respondents submitted that the demand was issued in accordance with Form No. 6 made pursuant to **Regulation 15(3)** of the *Regulations*. It is for that reason I also pointed out to Counsel for the Company that the Application having been brought under **Regulation 16** and **17** of the *Regulations* was erroneous. I drew the parties to my decision in *East Africa Cables PLC v SBM Bank (K) Limited HC COMM IP No. E171 of 2020 [2020] eKLR* where I discussed the

applicability of those provisions to insolvency and liquidation of a Company.

16. **Regulation 15** of the **Regulations, 2016** falls under **Part V** titled, “**PERSONAL BANKRUPTCY**” and the side note reads, “*Creditor may apply for bankruptcy order in respect of debtor*”. It provides as follows:

15. (1) *For the purposes of section 17 of the Act, the procedure Creditor may apply for complying with or setting aside a demand is as provided under for bankruptcy order in respect of debtor. Regulations 16 and 17.*

(2) *The creditor's application for bankruptcy order shall be in form of a petition in Form 3 set out in the First Schedule and shall be accompanied by the following documents— verifying affidavit which shall be in Form 4 set out in the First Schedule; proof of the debt which shall be in Form 5 set out in the First Schedule; and the application for appointment of trustee which shall be Form 9 of the First schedule.*

(3) *The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.*

(4) *The statutory demand in subregulation (3) shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor.*

(5) *The statutory demand specified in subregulation (3) shall be served on the debtor at least 21 days before the filing of the petition.*

(6) *The service of the statutory demand shall be in accordance with the Civil Procedure Rules, 2010. [Emphasis mine]*

17. The introductory part of **Regulation 15** above refers to **section 17** of the **Act** which is to be found in **PART III – BANKRUPTCY OF NATURAL PERSONS**. **Section 17** of the **Act** provides for persons entitled to make a bankruptcy petition. On the other hand, the controlling provision for Companies is to be found in **Regulation 77B** which was introduced by the **Insolvency (Amendment) Regulations, 2018** which states that:

77B (1) *For the purposes of section 425 of the Act an application for liquidation shall be-*

(a) *by way of a petition in Form 32C as set out in the First Schedule; and*

(b) *Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.*

(2) *The petition for liquidation shall be accompanied by the following documents –*

*(a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and*

*(b) A statement of financial position in Form 32 as set out in the First Schedule where necessary.*

18. The proper form under **Regulation 77B** of the **Regulations** is Form 32E which does not differ in material terms with Form No. 6. The substance thereof does not depart from the statutory requirements to be found in **section 384(1)(a)** of the **Act** which sets out the essential ingredients of a written demand as follows:

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;*

19. It has been held in several decisions that non-compliance with the form of the Statutory Demand is not fatal as long as all the statutory elements are set out in the demand (see **Re: Kipsigis Stores Limited ML HC IP No. 14 of 2016 [2017] eKLR** and **Re Sucasa at Mombasa Road Limited ML HC IP No. 9 of 2018 [2019] eKLR**). A summary of the position is set out in **Halsbury's Laws of England (4th Ed, Vol 7(2)) para. 1446** 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. [Emphasis mine]*

20. The Company relied on the decision in **BlueLine Properties Ltd v Mayfair Insurance Company Ltd (Supra)** to submit that the advocates were not creditors of the Company. The decision was grounded on the meaning of Creditor under **section 2** of the **Insolvency Act**, “includes a person entitled to enforce a final judgment or final order.” The use of the word, “includes” expands the meaning of creditor and is not exclusive to a person entitled to enforce a final judgment or final order. In **Mjengo Limited v Commissioner of Domestic Tax CA Civil Appeal No. 85 of 2014 [2016] eKLR**, the Court of Appeal adopted the dictum of Lord Watson in **Dilworth v Commissioner of Stamps [1899] A. C. 99, 105** where he explained that:

*The word “include” is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those thing which the interpretation clause declares that they shall include. But the word “include” is susceptible of another construction, which may became imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions. It may be equivalent to “mean and include,” and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.*

21. My interpretation of the meaning of creditor under **section 2** aforesaid is that it is not exclusive or limited to person entitled to enforce a judgment. It includes any other type of creditor. I would therefore depart from the decision in **Blueline Properties Ltd v Mayfair Insurance Company Ltd (Supra)**. Further, **section 2** does not require that the Statutory Demand be presented by the Creditor in person. It may be presented by an agent of the Creditor. This is a departure from **section 220** of the **Companies Act (Repealed)** which provided that the notice prior to winding up of a company must be under the hand of the creditor. It is clear that the Statutory Demand in Form 32E is signed by the Registrar of the Court and sets out the material details required under that notice and does not exclude presentation by an agent of the creditor.

#### **Whether the application should be allowed**

22. I now turn to the issue of the debt. Although the application was brought under **Regulations 16** and **17** of the **Regulations**, I am of the view that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the Rules. The factors underlined in **Regulation 17(5)** of the **Regulations** governing the exercise of discretion to strike out a statutory demand in case of bankruptcy are equally relevant in the case of a Company. The court may set aside the demand or adjourn the application as it deems fit. If it is proved that the debt is disputed on grounds which appear to the court substantial, the court may allow the application.

23. In the case of **Peter Munga v African Seed Investment Fund LLC HC COMM IC No. 2 of 2016 [2017]** the Court declined to strike out the statutory demand on the ground that some of the amount was disputed. The court observed that:

*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.*

24. In **Re Kipsigis Stores Limited (Supra)**, the learned Judge observed that;

*Clearly, an application to set aside or vacate a statutory notice on the basis of invalidity should be looked at in the light of the full circumstances of the case. The notice should not be set aside on the basis of a mere technicality. Rather regard should be had to all the circumstances including but not limited to whether the debt is owed as well as whether the overriding objective would be defeated by setting aside the notice. If not injustice flows from the consequences of non-compliance, then it would serve no purpose to set aside a statutory demand and to cause the statutory demand to be served again at cost.*

25. In this case, the Respondents have shown that there are decrees against the Company. In that respect, part of the debt is not disputed. The Company has admitted that it is indebted and that it requires time to reconcile accounts with the Respondents bearing in mind that it is dealing with several claims which may need to be verified. The court is not unmindful and is indeed entitled to take judicial notice of the COVID-19 pandemic that has adversely affected the business environment. The Company correctly points out that it is a regulated business and it has not been shown that it is insolvent. A winding up petition would definitely affect its business. It has also asked for an opportunity to settle its indebtedness.

26. Although there is no evidence that the Company is insolvent, the Court is enjoined to have regard to the policy framework of the **Act** which it is to enable companies and bodies to continue to operate as going concern so that ultimately they may be able to meet their financial obligations to their creditors in full or at least to the satisfaction of those creditors. The issue of a statutory demand and consequent presentation of a liquidation petition may well undermine that policy objective.

27. The court has jurisdiction not only to set aside the Statutory Demand, it also has jurisdiction to make an order that it deems fit and just in the circumstances. Having found the Statutory Demand valid and in view of the circumstances I have set out above, I adjourn these proceedings for a period of 6 months to enable the parties agree on a framework for settlement of the outstanding debt.

#### **Disposition**

28. For the reasons I have set out above, I now make the following orders:

(a) The final order on the Notice of Motion dated 9<sup>th</sup> June 2020 is adjourned for a period of 6 months from the date hereof to enable the parties agree on a framework for settlement of the debts subject of the Statutory Demand.

(b) That costs shall be in the cause.

**DATED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of SEPTEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr. M. Onyango.**

**Mr Kamau instructed by Howard, Nick and Kenneth Advocates for the Company/Applicant.**

**Mr Maingi instructed by Maingi Musyimi and Associates Advocates for the Respondents.**