



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

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**INSOLVENCY PETITION NO. E005 OF 2020**

**IN THE MATTER OF THE INSOLVENCY ACT, 2015**

**AND IN THE MATTER OF**

**ANTOW TRADING COMPANY LIMITED**

**BETWEEN**

**SATO PROPERTIES LIMITED .....PETITIONER**

**AND**

**ANTOW TRADING COMPANY LIMITED ..... RESPONDENT**

**RULING**

**The Petition**

1. The Petitioner presented the Liquidation Petition dated 30<sup>th</sup> January 2020 as a creditor. Its claim is based on the fact that it was awarded taxed costs in **ELC Suit No. 935 of 2012** amounting to Kshs. 2,609,810.00. The Petitioner states that it issued demand notices dated 31<sup>st</sup> October 2019 and 8<sup>th</sup> January 2020 addressed to the Company through its registered postal address and that it failed to pay despite the lapse of 21 days since the demand notices were served on it.
2. The Petitioner also avers that the Company is factually insolvent as it lacks assets, does not carry on any trade and has not lodged any financial statements and reports with the Registrar of Companies as required by **section 686** of the **Companies Act, 2015**. The Petitioner states that the Company's liability to the Petitioner is substantial and it is not in a position to pay its debts and there is no possibility or prospect of the Company becoming a successful concern and thus it is just and equitable that it should liquidated.

**The Application**

3. After the Petitioner advertised the petition in the Kenya Gazette dated 28<sup>th</sup> May 2020, the Company filed the Notice of Motion dated 8<sup>th</sup> June 2020 seeking the following reliefs:

(a) [Spent]

(b) *That there be a temporary injunction, pending the hearing and determination of this application, restraining the petitioner from further advertising the petition herein or issuing any other public statements regarding the petition herein or the intended liquidation of Antow Trading Company Limited.*

(c) *That the petition dated 30<sup>th</sup> January 2020 be struck out for being in violation of Regulation 77B of the insolvency (Amendment) Regulations 2018.*

(d) *That the petition dated 30<sup>th</sup> January 2020 be struck out for being an abuse of the court process.*

(e) *That the costs of the struck out petition be awarded to the company and be borne by the petitioner.*

4. The application is supported by the affidavit and supplementary of Jeneby Taita Too sworn on 8<sup>th</sup> June 2020 and 9<sup>th</sup> July 2020 respectively. In summary the Company claims that it was never served with the statutory demand notifying it of the intended liquidation order. It avers that the liquidation proceedings have been taken maliciously in order to prevent the Company from pursuing its lawful claims in **ELC No. 93 of 2018** and with a view to obtaining vacant possession of **LR No. 1870/1/217**. It asserts that the petition is being used as a means for debt collection. The Company also states that it is ready to settle the debt by paying installments.

5. The application is opposed by the replying affidavit of Anil Bharmal Shah, a director of the Petitioner. Both parties filed written submissions in which they addressed the court on their respective positions. At this point, I wish to point out that the debt due to the Petitioner is not a disputed debt as it has been ascertained by a lawful order of the court certifying the amount due on account of costs in **ELC Suit No. 935 of 2012**. As the Certificate of Taxation has not been set aside, it is final and conclusive as to the amount the Company owes the Petitioner. The form and substance of the demand is also not contested. The issues I have to decide are whether the demand notices were served on the Company as a condition precedent to presentation of the petition and whether the Petition is an abuse of the court process.

#### **Whether the Statutory Demand was served**

6. Whether the statutory demand was in fact served is a question of fact. The Petitioner through A. B. Shah, Advocate sent a demand letter dated 31<sup>st</sup> October 2019 to the Company by registered post to P O Box 32238 -00600, Nairobi and P O Box 57720 – 00200, Nairobi. The demand letter was copied to and served upon Kandie, Kimutai and Mudeizi and Company Advocates who received it under protest on the ground that it did not have instructions. Thereafter, the Petitioner sent a statutory demand dated 8<sup>th</sup> January 2020 to the Company by registered post through P O Box 32238-00600, Nairobi.

7. The Company through the deposition of Mr Too denied that it was served as alleged. In that regard, its advocate on record, wrote to the Post Master General to confirm the particulars of the addresses aforesaid. By a letter dated 8<sup>th</sup> June 2020, the Post Master General informed the Company's Advocates that Box 32238 - 00600 is rented to *On the Road Mambo Limited* is valid while Box 57720 - 00200 was rented to Nelson Kipkurui Mutai upto 1<sup>st</sup> July 2016 and was locked due to non-payment.

8. Counsel for the Company submitted that service of the statutory demand is a condition precedent for presenting a petition and there is no evidence that the Company was served with the demand at the Company's registered offices by the Creditor as required by **sections 384(1) and 424(e) of the Insolvency Act, 2015** ("the **Insolvency Act**") prior to commencement of these proceedings.

9. According to Anil Shah, Mr Jeneby Arap Too has consistently used Post Office Box 32238 – 00600, Nairobi when acting in his capacity as a director of the Company. He annexed a CR/12 from the Registrar of Companies dated 11<sup>th</sup> August 2008 addressed to the directors of the Company at P O Box 32238 Nairobi. He also referred to several affidavits in which the Company was a litigant; **ELC No. 477 of 2015** and **ELC No. 98 of 2018** in which Mr Too swore affidavits on behalf of the Company and used the same address between 2017 and 2019. In addition, he exhibited a letter dated 25<sup>th</sup> June 2020 from the Post Master General to the Petitioner's advocate showing that Mr Jeneby Arap Too had rented that Post Office Box 32238 from April 2005 and April 2009.

10. The Petitioner submitted that the Company does not operate an office and it has always understood that the address of the Company and its director, Jeneby Arap Too is P O Box 32238 – 00600, Nairobi hence the denial of the address is contrived as it is now using the address of its current advocates as its address. Counsel urged that the issue is whether the statutory demand, by sending the same by post to that director's avowed postal address and serving the same on its advocates, puts the Company on notice that the Petition would be filed if the debt was not paid.

11. Counsel for the Petitioner submitted that **section 729(3) of the Insolvency Act** provides that service on a Company shall be as provided under the **Companies Act, 2015**. The latter Act at **section 1101** provides that a document may be served on a director of the Company by sending it by post to the director's address. In this case, counsel argued, the demand was served on the director.

12. In response, the Company stated that evidence shows that P O Box 32238 – 00600 now belongs to a company known as *On the Road Mambo Limited* which is not in any way related to him. He also pointed out that as a director, he is a separate person from the Company which is a different legal entity. Counsel submitted that the Petitioner ought to have exercised due diligence at the Companies Registry to ascertain the correct address of the Company before issuing the statutory demand and filing the petition.

13. It is common ground that service of the written statutory demand is pre-requisite for 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;*

14. As was stated in **Re Kipsigis Stores Limited [2017] eKLR**, the **Insolvency Act** does not specify that service must be effected upon a director or officer of the Company, it is enough if left at the Company's registered offices. Onguto J., appreciated the fact that the Company may not be carrying on business at the registered office and 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.

15. I would add that even where service is not effected by leaving the demand at the place of business, there may be circumstances where service of the director is sufficient after taking sufficient steps to locate the registered and business premises of the Company. In this case, there is evidence from the CR 12 showing that P O Box 32238 was the registered address of the Company in 2008. The address is buttressed by the fact that Mr Too, the director who has been central to litigation involving the Company has used this address consistently, in his statements on oath, even after the year 2009 upto 2018. Finally, there is evidence from the Post Master General that the said address was used by the director for a period of time.

16. What the Company has avoided in its deposition in light of all this evidence is to state its known registered or business address. As counsel for the Petitioner pointed out, the Company is now using the address of its advocates on record. The address of the Company is a matter within its control. That is why the law requires that if the address is changed then the Company must notify the public of the change of address. All this shows that the Company is being evasive and the Petitioner could only have served it on the address disclosed by its director on oath in proceedings it had a direct interest.

17. Based on all this evidence, I find and hold that on the balance of probabilities that the Company was served with the statutory demand at its known address P O Box 32238 – 00600 and therefore the petition is properly before the court.

#### **Whether the petition should be struck out**

18. As I stated earlier the Company is indebted to the Petitioner and that debt is not disputed. Failure to resolve the debt is also evidence of the other grounds upon which the petition is grounded. The serving of a statutory demand is not a pre-requisite for the filing of a liquidation petition on any of the 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 and Company (Kenya) Limited v Muchina [1982] KLR 1**).

19. The Petitioner has 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 answered these allegations. It has only stated that it is amenable to having the debt paid over a period of three years. All these are matters that the court will take into account when hearing the petition. I would adopt the word of Visram JA speaking for the majority in **Prideinn Hotels and Investments Limited v Tropicana Hotels Limited MSA CA Civil Appeal No. 98 of 2017 [2018] eKLR** 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.*

20. The same principle would apply if the petition is based on the other grounds. I therefore decline to strike out the petition bearing in mind that even at the hearing of the petition, the court may yet 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**.

21. The Notice of Motion dated 8<sup>th</sup> June 2020 is dismissed with costs to the Petitioner. The petition shall now be set down for hearing.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of SEPTEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Shah with him Mr Kamau instructed by A. B. Shah, Advocate for the Petitioner.

Ms Nyongesa instructed by Nyongesa Nafula and Company Advocates for the Company.