



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

**COMMERCIAL AND TAX DIVISION**

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

**INSOLVENCY NOTICE PETITION NO. E006 OF 2020**

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

**AND IN THE MATTER OF**

**DAC AVIATION (E.A) LIMITED**

**BETWEEN**

**DAC AVIATION (EA) LIMITED .....APPLICANT**

**AND**

**STEVENSON KIBARA NDUNG’U ..... 1<sup>ST</sup> RESPONDENT**

**NICK MUSILI MUSYOKA ..... 2<sup>ND</sup> RESPONDENT**

**JOHN ROBERT KAVULU .....3<sup>RD</sup> RESPONDENT**

**TEDDY GITAGIA MBUGUA ..... 4<sup>TH</sup> RESPONDENT**

**MOSES BILAHU M’RABU .....5<sup>TH</sup> RESPONDENT**

**DAVID MUTSI KATUNGU ..... 6<sup>TH</sup> RESPONDENT**

**AUSTIN EMMANUEL MUNYALO MBALO..... 7<sup>TH</sup> RESPONDENT**

**ERNEST NDUNG’U NJENGA.....8<sup>TH</sup> RESPONDENT**

**MOHAMMED HAMDUN SAID ..... 9<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. As the name suggests, the applicant (“the Company”) is an aviation company. The Respondents, through their advocates, issued and served a Statutory Demand dated 5<sup>th</sup> June 2020 (“the Statutory Demand”) on the Company demanding Kshs. 3,766,418.00 plus USD 107,780.00 being the cumulative amount claimed by the Respondents arising from service contracts with the Company to be paid within 21 days from the date of service in default of which they would commence liquidation proceedings against the Company.

2. The Company filed an application dated 30<sup>th</sup> June 2020 under **sections 425(1)(b), 692 and 696(1)** of the **Insolvency Act, 2015** (“the **Act**”), **Regulations 3, 10, 15, 16, 17 and 77B(2)** of the **Insolvency Regulations, 2016** (“the **Regulations**”) seeking orders to restrain the Respondents from filing and advertising an intended Insolvency Petition based on the Statutory Demand and to set aside and/or vacate the Statutory Demand dated 5<sup>th</sup> June 2020.

3. The application is grounded on the supporting and supplementary affidavits of the Company's Accountable Manager sworn on 30<sup>th</sup> June 2020 and 12<sup>th</sup> November 2020 respectively. The application is opposed by the replying affidavit of John Robert Kavulu sworn on 29<sup>th</sup> July 2020. The Company impugns the Statutory Demand on technical and substantive grounds. I propose to deal with the technical grounds first.

#### **Whether Statutory Demand is defective.**

4. In this respect, the Company contended that the Statutory Demand was not endorsed by the Deputy Registrar before it was served on the Company in contravention of the mandatory terms by **Regulation 15(3)** and **(4)** as read together with **Regulation 77B(2)(a)** of the **Insolvency Regulations, 2016** and was therefore fatally defective. It also argues that the Statutory Demand contains claims on behalf of parties made by unauthorised persons contrary to **section 17(2)** of the **Act** as read together with **Regulation 77B (2)(a)** of the **Insolvency Regulations, 2016** and the same is therefore fatally defective. Lastly, that the Statutory Demand does not contain the full information as provided under by **section 17(2)** of the **Act** as read together with **Regulation 77B (2) (a)** of the **Insolvency Regulations, 2016** and that it is fatally defective.

5. For purposes of clarity, it is important to point out that the **Insolvency (Amendment) Regulations, 2018** enacted by **Legal Notice No. 7 of 2018** amended the **Insolvency Regulations, 2016 (LN. No. 47 of 2016)** ("the **Regulations, 2016**").

6. **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]*

7. 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. It is clear therefore that **Regulation 15** does not apply to insolvency but to bankruptcy of natural person. **Regulation 77B** to the **Regulations, 2016** and which states as follows:

*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. [Emphasis mine]*

8. The Company received the Statutory Demand dated 5<sup>th</sup> June 2010 signed by the Respondent's advocates but countersigned against each Respondent's claim by the respondent. **Section 384(1)(a)** of the **Act** which sets out the essential ingredients of a written demand provides 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;*

9. There is a plethora of decisions from our courts holding 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 INC No. 14 of 2016**). In **Re: Sucasa at**

**Mombasa Road ML HC INC No. 9 of 2018 [2019] eKLR**, the learned judge quoted with the approval *Halsbury's Laws of England (4th Ed, Vol 7(2)) para. 1446* on the ingredients of a statutory notice:

*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.*

10. I have looked at the Statutory Demand and I am satisfied that it complied with **section 384** of the **Act** as I have set out above.

11. The Company further argues that the Statutory Demand issued by the Respondents was not endorsed by the Deputy Registrar as is shown in Form 32C. Unlike **Regulation 6** of the **Regulations** which introduced an amendment to **Regulation 15** of the **Regulations, 2016** to provide that the “*The Statutory Demand ..... shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor*”, **Regulation 77B** of the **Regulations, 2016** is silent on the issue of endorsement. The former provision is in relation to bankruptcy and not insolvency of a company. Though the requirement for endorsement appears in Form 32E, such requirement is not imposed by **Regulation 77B** of **Regulations, 2016** which is applicable to this case. Nothing would have been easier than for the rule maker, to impose a requirement for endorsement in **Regulation 77B** aforesaid if it was indeed necessary. I therefore find and hold that failure to endorse the statutory demand by the Deputy Registrar does not invalidate the demand issued by the petitioner.

12. It has been argued 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 an application for a bankruptcy can only be initiated by a bonafide creditor as defined under **section 2** thereof as, “*including a person entitled to enforce a final judgment or final order.*” Based on this provision and relying on **Blueline Properties Limited v Mayfair Insurance Company Limited HCOMM IP No. 12 of 2018 [2019] eKLR** it has been argued that a statutory demand signed by an agent such as an advocate is defective. I am unable to accept this argument as the use of the word, “*includes*” in **section 2** of the **Act** as stated above expands the meaning of creditor and is not exclusive to a person entitled to enforce a final judgment or final order (See **Mjengo Limited v Commissioner of Domestic Tax CA Civil Appeal No. 85 of 2014 [2016] eKLR**).

13. Further, **section 2** of the **Act** does not require that the Statutory Demand be presented by the Creditor in person. It may be presented by an agent of the Creditor such as an advocate. 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. In this case, the Statutory Demand was presented by the Respondents’ advocates who are their agents. All in all, I am persuaded to adopt what Onguto J., stated in **Re: Kipsigis Stores Limited ML HC IP No. 14 of 2016 [2017] eKLR** as follows:

*[40] 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 no 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.*

14. In conclusion, I find and hold that the Statutory Demand sets out the substance of the Respondents’ claims by against the Company. It is substantially in Form 32E and while it is not required to be signed by the Deputy Registrar of the Court, it sets out the material details required under that notice and is signed by and presented by an authorised agent of the creditor.

#### **Whether the Debt is disputed**

15. I now turn the substantive ground of the application which relates to the debt claimed in the Statutory Demand. 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 **Regulations**.

16. 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 insolvency of a Company. The court may set aside the demand or adjourn the application as it deems fit and if it is proved that the debt is disputed on grounds which appear to the court substantial, the court may allow the application.

17. In **Universal Hardware Limited v African Safari Club Limited MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR**, Makhandia JA., giving the lead judgment of the Court of Appeal, summarized the position regarding striking out a petition on account of a disputed debt. He observed that:

*The principle as I understand 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.*

Since the court is bound to strike out a liquidation petition founded on a disputed debt, a Statutory Demand based on a disputed debt must face the same fate.

18. It common ground that at some point, the Respondents were employees of the Company. According to John Kavulu’s deposition, the Respondents, “*were sacked unceremoniously and or forced to resign and their remuneration not paid to them to date.*” The claims forming

the basis of the Statutory Demand comprise remuneration owed to each of them following termination of their respective employment contracts.

19. The Company takes the position that the debt claimed in the Statutory Demand is disputed on substantial grounds including the fact that the claims are excessive and unproven and that the Company suffered substantial loss as a result of serious breaches occasioned by the Respondents' conduct and which it intends to counterclaim. It adds that the claims are matters which ought to be adjudicated by the Employment and Labour Relations Court ("ELRC") as provided under the **Employment Act, 2007**.

20. The parties have traded bitter accusations against each other which I need not repeat here in order to answer whether the debt claimed is disputed on substantial and bona fide grounds. In this respect, it common ground that the money claimed by the Respondents from the Company arises out of employment contracts. The Company has denied the claims and asserts that they must be proved. Hearing of the intended petition will require the court to consider and determine the Company's liability and award remedies, if any, based on employment law. As the Company correctly points out, the Constitution and the law has provided a specific forum for adjudication of employment claims.

21. Ordinarily the High Court lacks jurisdiction to entertain disputes between employer and employee. Under **Article 169(2)** of the Constitution as read with **section 12(1)** of the **Employment and Labour Relations Act, 2011**, the ELRC has exclusive jurisdiction to hear appeals from courts and tribunals on labour and employment disputes. The exclusivity of the jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was recently buttressed by the Supreme Court in **Republic v Karisa Chengo & Others, SCK Petition No. 5 of 2015[2017]eKLR**. It would therefore be improper for this court to permit the Respondents to circumvent the strictures of jurisdiction in order to have their claims resolved by the High Court exercising insolvency jurisdiction.

22. The Respondents have claimed that the Company is disposing of properties and that is why they have sought the protection of this court. In my view, the ELRC, like the High Court has jurisdiction to issue *quia timet* remedies in an appropriate case in order to protect the Respondents. This cannot be a reason to invoke the jurisdiction of the High Court.

23. For the reasons I have set out I find and hold that in so far as the relationship between the Respondents and the Company is based on employment contracts and their claims are disputed by the Company on bona fide grounds, the presentation of the Statutory Demand is an abuse of the Court process.

#### **Disposition**

24. For the reasons I have set out above, I allow the Notice of Motion dated 30<sup>th</sup> June 2020 and set aside the Statutory Demand dated 5<sup>th</sup> June 2020. The Respondents shall bear the costs of these proceedings.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of NOVEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Mwangi instructed by Muumbi and Company Advocates for the Creditors/Respondents.

Mr Mshweshwe, Advocates for the Company/Debtor.