



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI
PETITION NO.9 OF 2017
IN THE MATTER OF LONGONOT GATE DEVELOPMENT LIMITED
BETWEEN
LONGONOT GATE DEVELOPMENT LIMITED.....APPLICANT
-VRSUS-
RAINBOW PROJECTS LIMITED.....1ST RESPONDENT
SALEEM HAJI.....2ND RESPONDENT
RULING

The Applicant filed Notice of motion dated 25th April 2017 seeking the following orders

1. to restrain the respondents from advertising or gazetting or in any other way giving notice to the public or to interested parties of filing or issuance of the statutory demand in this cause filed on 31st march 2017 and issued on 3rd April 2017
2. Stay of filing of creditors' petition pursuant to the said statutory notice.
3. Transfer of this petition to high court commercial division in Nairobi.

The petition was transferred to Nairobi and on the first mention, parties herein sought time to attempt an out of court settlement. They failed to reach a settlement and directions were given for the application to proceed by way of written submissions. Counsels for the parties herein highlighted submissions on 9th October 2017.

Counsel for the applicant submitted that under section 384 of insolvency Act, where there is inability to pay a debt, the petitioner issue written demand. He submitted that what has been annexed to the petition is what he understand as petitioner's demand dated 26th September 2016. He submitted that it is mandatory that statutory demand be served on the company. He submitted that the respondent purport to have served but there is no explanation in the replying affidavit as to who Hilda mentioned in the delivery note is, where she was found and how she is connected to the applicant; whether she had powers to receive the document.

The applicant further submitted that the document purporting to prove service by G4S do not show where it was delivered, to whom and what date. He argued that petitioner's written demand is mandatory before filing for liquidation of a company. He submitted there is no evidence that demand was issued and there appear to be confusion on the part of the petitioner as to which demand is supposed to be statutory demand.

Counsel further submitted that the statutory demand applied from the court on 3rd April 2017 and issued on 4th April 2017 anticipate that 21 days notice must be given but the petition was filed together with the statutory demand. He submitted that there is confusion as the petitioner is talking of demand letter and on the other a statutory demand. He said if the petitioner wants to rely on demand for payment then there is no prove that it was served. And if they want to rely on statutory demand issued on 4th April 2017 then it does not conform to requirements of section 384 of insolvency Act 2015 for a valid notice and the petition is premature.

Counsel for the respondents submitted that it is agreed that insolvency Act is fairly new and there is a lot of discourse on what should be done and what should not be done. He however agreed that there is clarity that there is need for statutory demand. He submitted that section 384 of the insolvency Act closely mirrors section 220 of the repealed companies Act cap 486 L.O.K.; that in both statutes the basis of filing petition is issuance of statutory demand. He said the word used in both statutes is “written demand” and that written demand is statutory notice because it is written pursuant to statute. He referred to **Insolvency case no.14 of 2016-in the matter of kipsigis stores Limited (2017) eKLR** where the court held as follows;

- demand must be in writing
- Demand must be issued by the petitioner to the debtor.
- Demand must contain full particulars of the claim
- Demand must be served upon the debtor at its registered office.

Counsel for respondent submitted that they issued demand on 26th September 2016 and it was never challenged. He said service can either be in the company’s registered office or by G4S.He added that the demand the respondent served is written demand dated 26th September 2016.He submitted that it is common knowledge that there are no rules of procedure. And that recently judge Tuiyot held that in the absence of rules we follow what is logical and sensible under the repealed companies Act. He added that the official receiver would not have proceeded to act without issuance of statutory notice. He submitted that demand was sent by licensed courier to longonot Gate Development Limited and they cannot claim not to have received. He concluded that a valid statutory notice was issued.

In response Mr. Kimani for the applicant confirmed that the applicant was served with the petition, statutory demand and bundle of documents on 7th April 2017.He said the petitioner has not been served with demand for payment. He said we cannot take what is legislated statutory demand and written demand as one. He asked “which between the two attached demands is to be taken as statutory demand by court?”

There is no dispute that both the repealed companies Act and Insolvency Act 2015 provide for demand to be issued to a company before petition for liquidation is filed.In this petition it is not disputed that two demands have been attached to this proceedings; one issued the same day the petition was filed and a second one alleged to have been served on the applicant on 16th September 2016.counsel for the respondent submitted that the demand which is the basis of this petition is the one issued on 26th September 2016.Applicant denies services of the demand whereas the respondent submitted that it was served in the office of the company and by licensed courier; and that any of the two modes of service are sufficient as by statute.

I wish to consider whether the demand dated 26th September 2017 qualify as written demand anticipated by insolvency Act 2015.

Section 384(a) of insolvency Act prove as follows;

“if a creditor (by assignment or otherwise) to whom a 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 secure or compound for it to the reasonable satisfaction of creditor.”

On perusal of statutory notice dated 26th September 2016 I note that it is titled statutory demand under section 384 of insolvency Act 2015. It gives the company 3 weeks to pay the debt failure which it will be deemed unable to pay its debts in the meaning of section 384 of the insolvency Act. Demand prior to filing petition for liquidation is intended to call upon the company to pay its debts within time specified by statute which is 21days.This was clearly shown by the content of the statutory demand. The key issue here is the content not the format. Does it serve the purpose of a written demand. I believe it does.t calls for payment of debt within the required 21 days; time specified by statute failure which a conclusion will be reached to the effect that it is unable to pay its debts.

Requirement for issuance and service of written demand serves to protect companies which are willing and able to pay to sort out their issues without being subjected to public embarrassment which may negatively affect the image of the company. The demand though titled statutory demand meet the intention of section 384 of insolvency Act. I therefore find that it is proper demand.

What follows is what effect does the statutory demand issued with the petition has?

Regulation 15 of insolvency Rules refer to personal bankruptcy and sub regulation 3 provide for petition for bankruptcy to be preceded by statutory demand which shall be in form 6 set out in first schedule. I believe issuance of statutory demand was in error which could have been occasioned by lack of clarity on procedures of filing winding up petition occasioned by lack of rules of procedure which are yet to be made by the Rules committee. Petition should not be served together with a statutory notice.

Having found that the statutory notice dated 26th September 2016 is proper, I wish to consider whether the applicant was served. As earlier noted, on the face of the statutory demand, it is indicated “by hand and registered post”. The respondent has attached G4S receipt and delivery note. Delivery note indicate delivery of statutory demand to Hilda. Counsel for the applicant submitted that there is no explanation as to who Hilda is and how she is connected to the applicant and whether she had powers to receive the document.Section384 (a) of Insolvency Act provide for service of written demand by leaving it at the company’s registered office. There is no requirement to serve specific persons in the company. It was not therefore not necessary to find who the recipient was and how she was related to the company as long as the demand was delivered at the company’s registered office. There is also receipt from G4s indicating that it was sent via courier. Both delivery note and G4S receipt are dated 26th September 2016.I have no reason to doubt the authenticity of the two documents. From the foregoing I find that statutory demand was served on the applicant.

I find the application devoid of merit and dismissed it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2017

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

WANJALA.....COURT ASSISTANT

Kimani.....Counsel For Applicant

Mailu.....Counsel Respondent