



**Nairobi Enterprise Limited v Mc'Ombewa (Insolvency Notice E185 of 2024)
[2025] KEHC 1853 (KLR) (Commercial and Tax) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1853 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E185 OF 2024
JWW MONG'ARE, J
FEBRUARY 24, 2025**

BETWEEN

NAIROBI ENTERPRISE LIMITED APPLICANT

AND

DR HEZRON MC'OMBWA RESPONDENT

RULING

1. The respondent has by a Certificate of Urgency moved this Honourable Court through a Notice of Motion application brought under Section 17 (3), (4), (5) and (6) of the *Insolvency Act* and Regulations 16 and 17 of the Insolvency regulations seeking the following orders:-
 1. Spent
 2. That this Honourable Court be please to set aside the Statutory notice/Demand
 3. That costs of this application be provided for.
2. The application is supported by the grounds set on its face and the supporting affidavit of Dr. Hezron MC'ombewa. It is opposed and the Petitioner has filed a Replying affidavit sworn by Rajan Dhanani, a director of the Petitioner on 2/10/2024. The application was canvassed through written submissions with the Respondent/Applicant filing theirs on 16/10/2024 and the Petitioner filing their written submissions on 12/11/2024.

Analysis and Determination

3. I have carefully considered the application and the supporting affidavit by the Applicant and the Replying affidavit by the Petitioner together with the rival submission and I note that what the court



is called to determine is whether the statutory demand issued to the Respondent herein should be set aside.

4. The Respondent argues that the debt pursuant to which the demand has been issued was incurred by a separate legal entity, Port Florence Hospital to which he and a Mr. Joshua Odongo Oron are directors and to which they acted as guarantors to the debt herein. It is the position put forward by the Respondent parties to Nairobi CMCC Civil Case No. 5181 Of 2017-nairobi Enterprises LTD VS Port Florence Community Hospital, Joshua Odongo Oron And Dr. Hezron Mc'ombewa compromised the suit and a consent was reached and filed with the court and that pursuant thereto, parties agreed on the modalities of settling the said debt. It is the position of the Applicant that the Petitioner has not complied with its part as regards the said consent and instead taken to filing the Statutory Demand Notices against the Respondent and Mr. Joshua Odongo Oron separately to pressurize them to settle the debt. The Applicant has argued that on their part complied with the terms of the consent order and have indeed reduced the outstanding debt from Kshs.7,443,385.60/= and has paid Kshs.6,195,000/= leaving a balance of Kshs.948,385/=. The Respondent further contends that the Petitioner, as part of the deed of settlement was supposed to attach a property belonging to the 1st Defendant in the primary suit but have failed to do so. The Respondent urges the court to find that the Statutory Notice is premature and set the same aside.
5. In opposing the application, the Petitioner has filed a replying affidavit sworn by one of its directors. While confirming indeed there is a suit between the Applicant and itself and two other parties, the Petitioner argues that pursuant to deed of settlement recorded with the Court as a consent order of the parties, the Petitioner is within its rights to pursue the recovery of its debt by all means including issuing a statutory notice under the *Insolvency Act*, as it has done against either of the parties. The Petitioner further argues that because of difficulties in getting the debt settled by the Principal Debtor, Port Florence Community Hospital, the parties entered into a deed of settlement with the Respondent and his co-director, Mr. Joshua Odongo Oron as guarantors to the debt and subsequently filed suit no. CMCC No. 5181 of 2017 from a whence a consent order was recorded. The Petitioners argue that they have attempted to collect the above debt but upon sending Auctioneers to proclaim property of Port Florence Community Hospital, they encountered difficulties as the said property was already proclaimed by a different debtor. The Petitioner argues that the Defendants in the said suit were to deliver a title No. Kisumu/Municipality/ block 10785 as part of debt settlement but have failed to do so, leaving the Petitioners with limited options to collect the debt and as result, the Petitioners argue that the Statutory Notice is one of the options available to it for the recovery of its debt herein.
6. Regulation 17 (6) of the Insolvency regulations 2016 provides that grounds upon which a court can set aside a Statutory Notice as follows:-
 - a. The debtor appears to have a counterclaim, set off or cross demand which equals or exceeds the amount of the debt or debts specified in the Statutory Demand;
 - b. The debt is disputed on the grounds which appear to the court to be substantial;
 - c. It appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
 - d. The court is satisfied, on either grounds, that the demand ought to set aside.



7. The court in the case of Flower City Limited vs Poly tanks & Containers Limited (2021)KEHC 34 (KLR) had this to say as regards its power to set aside a statutory demand:-

“.....the existence of a genuine dispute regarding the debt is a sufficient ground for the court to set aside a Statutory Demand. The policy underlying this provision is that the Statutory Demand procedure should not be used to coerce a person to pay a disputed amount....

The court must be satisfied that there is a dispute that is not plainly vexatious or frivolous. The court must be satisfied that there is a claim that may have some substance.”

8. From the affidavits placed before this court, it is clear that there is a debt that arises out of CMCC No. 5181 of 2017 where the Petitioner and the Respondents were both parties. While the Petitioner seeks to recover the sum of Kshs.4,449,485.60/= from the Respondent and the two other parties, the Respondent depones that what is indeed owing is Kshs.948,385.60/= and that there has been active efforts made toward reducing this debt by the Principal Debtor, Port Florence Community Hospital, including offering security in form of Land Title L.R. No. Kisumu Municipality/ Block/10785. It therefore follows that the debt between the Petitioner and the Respondent is not only disputed but parties in the deed of settlement agreed to provide a security for it.

9. While I agree with the Petitioners that insolvency proceedings are one option available to it for the realization of its debt, I hold the view that this should not be the first step a party takes as bankruptcy proceedings have far reaching consequences if taken to their logical conclusion. I have therefore considered the arguments put forward by both parties in the present application and I am satisfied that the Applicant has made out a case to warrant this court to set aside and vacate the Statutory Demand issued herein before by the Petitioner in line with the provisions of Regulation 17(6) of the Insolvency Regulations 2019 cited above. Let the Petitioner exhaust all the other available execution proceedings including the attachment of the security offered to it by the Defendants in CMCC No. 5181 of 2017, among other options available to it.

10. In conclusion, I find and hold therefore the application dated 19th September is merited and I allow the same and hereby set aside the Statutory Demand issued by the Petitioner to the Respondent herein. I direct that due to the circumstances of the matter before this court, each party shall bear their own costs of this application. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2025

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J.W.W. MONGARE

JUDGE

In the Presence of:-

1. Ms. Adhiambo for the Petitioner.
2. Ms. Okaka for the Respondent/Applicant.
3. Amos - Court Assistant

