



**Smruti Builders Company Limited v Southside Suites Limited (Insolvency Cause E055 of 2024) [2025] KEHC 1397 (KLR) (Commercial and Tax) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1397 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E055 OF 2024**

**BM MUSYOKI, J**

**FEBRUARY 20, 2025**

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

**BETWEEN**

**SMRUTI BUILDERS COMPANY LIMITED ..... CREDITOR**

**AND**

**SOUTHSIDE SUITES LIMITED ..... DEBTOR**

**RULING**

1. By a statutory demand dated 1-03-2024 issued under Section 384(1) and 425 (1) of the *Insolvency Act* Chapter 53 of the Laws of Kenya, the respondent required the applicant to pay a sum of Kshs 10,000,000.00 being amount due and arising from what it referred to as interim certificate number 27. After the demand was served, the applicant by a notice of motion dated 20<sup>th</sup> March 2024 sought to have the same set aside.
2. The notice of motion is supported by affidavit of Kwame Kariuki who describes himself as a director of the applicant sworn on the same date of 20-03-2024 and supplementary affidavit by the same deponent sworn on 16<sup>th</sup> April 2024. From the documents filed by the parties including their submissions, this court discerns that the applicant had engaged the respondent for construction of some flats at a contract price which the applicant maintains was Kshs 174,604,655/= while the respondents states that the same was Kshs 192,500,000.00. Despite that difference, the parties are in agreement that the outstanding debt is agreed previous amount of Kshs 25,176,767.50 and subsequent certificate worth Kshs 10,000,000.00. The applicant depones that the former is subject of this court's commercial suit number E053 of 2024 while the latter is an accrual from the aforesaid certificate.
3. Mr. Kwame Kariuki adds that, the parties mutually agreed to part ways on 23-10-2023 where they agreed on a debt of Kshs 25,176,767.50 and a further Kshs 10,000,000.00 to be released in the final



account. According to the applicant, the respondent has sued for Kshs 25,176,676.50 and issued a statutory demand for the balance of Kshs 10,000,000.00. Mr. Kariuki adds that in an attempt to settle the debt owed to the respondent, the applicant offered 6 apartments at a discounted price of Kshs 6,000,000.00 which the respondent accepted but later frustrated. It is the position of the applicant that there are 10 units pending for completion and sale whose value is more than adequate to settle the sum owed to the respondent. He adds that the statutory demand was a strong-arm tactic and malicious statement to arm-twist the applicant who is willing to settle the debt.

4. The application is opposed through a replying affidavit of Devendra Keshra Rabadia sworn on 28-03-2024. The deponent states that the respondent was improperly evicted from the site on 2-10-2023 and in a meeting held on 12-10-2023 mutual termination of the contract was discussed but was never implemented. While he admits that the debt owed to the respondent is Kshs 35,176,676.50, he denies that the Kshs 10,000,000.00 was to be paid on final account. He states that the Kshs 10,000,000.00 arose from an interim certificate issued by the project architect on 16<sup>th</sup> February 2024 and it was to be paid immediately.
5. The respondent admits that six flats were offered as a setoff of the debt but the said offer was withdrawn vide a letter dated 4-10-2023. It adds that commercial suit number E053 of 2024 related to incidences of 2<sup>nd</sup> October 20023 when it was forcefully, improperly an unprocedurally removed from the construction site.
6. The respondent believes that the applicant is unable to pay its debts hence the statutory demand. The respondent claims that the applicant's place of business is unknown and it has had difficulties in serving notices and its directors have been blocked by the applicant making communication between the parties difficult and attempts to have meetings at the site have also been blocked.
7. I must state that the parties have not given this court the full background and genesis of their contract but from the information in the parties' documents, the court understands that the same was for development of some flats on LR number 209/3773 in Kapiti Road South C Nairobi. That said, it is not disputed that the debt of Kshs 10,000,000.00 exists although the applicant claims in the supporting affidavit that the same was to be paid upon final accounts whereas the respondent avers that it was to be paid immediately after issuance of interim certificate number 27.
8. The grounds upon which a statutory demand may be set aside are provided for in Regulation 17(6) of the Insolvency Regulations 2016. Th Regulation states that;

The Court may grant the application if;

- 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 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 other grounds, that the demand ought to be set aside.'
9. The applicant has in its submissions sought to rely on paragraph 17(6)(c). According to the applicant, the ten units which have allegedly been reserved for purposes of settling the debt are adequate security.



A simple interpretation of the paragraph would show that the security referred to therein must be a security held by the creditor. In this case, the units the applicant is referring to are not in the hands or control of the respondent. The respondent was evicted from the site on 2-10-2023 and actually that was the genesis of commercial suit number E053 of 2024.

10. I have seen an email dated 2-10-2023 attached as annexure 'DKR1' in the respondent's replying affidavit. This email is signed off by one Kwame who I believe is the deponent of the applicant's supporting and supplementary affidavits and it states that one Davendra who I believe meant the respondent was to be kept out of the site by force. In such a scenario, the respondent would not be expected to even know when the units are completed and ready for sale leave alone the actual sale. Without control or right of input on the completion of the development and without registered right or interest over the units, the respondent cannot be said to be holding security for the debt and in the circumstances, it is my holding that Regulation 17(6)(c) of the Insolvency Regulations 2016 is not applicable in this case.
11. The applicant does not claim set-off neither does it have a counterclaim. Similarly, it does not dispute the debt. It instead, the applicant argues that it has been willing to settle the debt through the previous offer of six flats and later reservation of ten units as indicated above. I have looked at the correspondences between the advocates for the parties which are exhibited as annexures 'DKR4', 'DKR5' and 'DKR6' of the respondent's replying affidavit. I have also seen the emails produced in the applicant's supporting affidavit as annexure 'KK3'. I note therefrom that the offer of the flats was made in May and June 2023 and specifically on 4-10-2023, the applicant withdrew the offer.
12. It has caught my eyes that the above offer and withdraw were made even before the parties parted ways in their meeting held on 12-10-2023 although the minutes to that effect seem to have been signed on 23-10-2023. The debt in this matter arose on 16-02-2024 when the certificate was issued by the architect after which there has been no efforts to settle the same. It is noteworthy that the certificate has not been disputed. Where there is no reasonable dispute over the debt, the court would not be justified to set aside a valid statutory demand. In *Flower City Limited v Poly tanks & Containers Kenya Limited* (2021) KEHC 34 (KLR), it was held that;

Judicial pronouncements are in agreement that the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defense and not a mere semblance of a defense. It is not sufficient to dispute the debt. The person disputing must go further and demonstrate on reasonable grounds why he is disputing the debt.'
13. The applicant also claims that it has reserved ten units which are enough to pay the respondent once they are sold. The sale of the said units is not definite or assured. The debt has accrued and cannot be postponed to await outcome of a speculative adventure over which the respondent has no control. The main test here is whether the applicant is able to pay its debts and it is my finding that the applicant has failed to demonstrate that it is able to do so.
14. I have looked at the pleadings in commercial suit number E053 of 2024 in which the respondent herein prays for the following orders;
  - a. A permanent injunction restraining the defendant, either by himself, his servants, agents and/or employees from entering, trespassing into, digging, building structures, depositing construction materials, or from interfering with the units in the building either by sale, offering for sale, auction, sale by



private treaty, transfer or disposal by any means whatsoever and howsoever in any other manner in dealing with the property known as LR209/3773 in south B to the adverse interests of the applicant.

b. Costs of the suit and interest the rate of 13% until payment in full.’

15. Where a statutory demand is in respect of same issues as in an existing civil suit, the court in my opinion would be justified to set it aside. However, it is clear to me that the dispute in the commercial suit is quite different from and unrelated to the debt claimed in the statutory demand. The amount in the statutory demand became due and payable after the suit was filed and it is not part of the issues or claims in the commercial suit. In my mind, the commercial suit cannot be a reason for allowing the application.

16. In view of what I have stated above, it is my finding that the application dated 20-03-2024 is unmerited and I dismiss it with costs to the respondents.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**B.M. MUSYOKI**

**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Mr. Onduso for the applicant/debtor and Mr. Muriungi holding brief for Mr. Shah for the respondent/creditor

