



Tropic Air Limited v Old Mutual General Insurance Kenya Limited (Insolvency Notice E004 of 2024) [2025] KEHC 3260 (KLR) (Commercial and Tax) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3260 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E004 OF 2024
PM MULWA, J
FEBRUARY 13, 2025**

BETWEEN

TROPIC AIR LIMITED CREDITOR

AND

OLD MUTUAL GENERAL INSURANCE KENYA LIMITED DEBTOR

RULING

1. This ruling relates to the Notice of Motion application filed on 31st January 2024, brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Section 38 of the *Insolvency Act* No. 18 of 2015, Section 173 of the *Insurance Act*, and Regulations 16, 17 and 77B (2)(a) of the Insolvency Regulations, 2016. The Applicant seeks orders to set aside the Statutory Demand issued on 10th January 2024 and stay any further proceedings against the company.
2. The application challenges a statutory demand for USD 3,000,000 issued by Tropic Air Limited, claiming it is made in bad faith and constitutes an abuse of the court process. The Applicant asserts that the demand is an attempt to pressure them without valid grounds for liquidation, as the sum demanded is disputed and not justified as evidence of the Applicant's inability to pay debts.
3. In support, the Applicant has filed an affidavit sworn by Frankline Nyaga, stating that the debt is in dispute and an appeal against the Insurance Regulatory Authority's judgment is ongoing. A stay of execution was granted, and the Applicant argues that the demand should not proceed while the appeal is pending.
4. In response, James David Roberts, the director of Tropic Air Limited, filed a replying affidavit. He explains that the debt stems from an accident involving an aircraft in August 2022, for which compensation was owed by the Applicant. Despite a legitimate claim being raised, the applicant failed to compensate, and the Insurance Regulatory Authority directed the Applicant to pay on 3rd



November 2023 but the latter did not comply. The debtor withdrew the appeal and thus the decision of the Insurance Regulatory Authority has not been challenged.

5. I have carefully considered the pleadings, as well as the submissions made by the parties. The primary issue for determination is whether the statutory demand issued against the applicant should be set aside. In this regard, the Applicant contends that the demand is not valid due to the ongoing appeal and the fact that the debt is disputed.
6. It is well-established that a statutory demand is typically issued when a company is unable to pay its debts. Section 384(1) of the *Insolvency Act* outlines the circumstances in which a company may be deemed unable to pay its debts. In particular, the Act provides that a company will be considered unable to pay its debts as follows:
 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;
 - b. if execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
 - c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due.
7. In the present case, the statutory demand served by Tropic Air Limited calls for payment of USD 3,000,000. The applicant, however, disputes the validity of this debt, asserting that the amount is contested and that an appeal has been filed to challenge a related decision from the Insurance Regulatory Authority. The question, therefore, arises whether the applicant’s dispute of the debt and the existence of an appeal can be grounds for setting aside the statutory demand.
8. Regulations 16 and 17 of the Insolvency Regulations provide grounds upon which the court can set aside a statutory demand and the procedure to be followed. Regulation 17(6) on hearing of application to set aside statutory demand states:

“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. In this case, the Applicant disputes the debt amount claimed in the statutory demand, citing the pending appeal against the decision of the Insurance Regulatory Authority. However, upon review, I note that the Applicant has since withdrawn the appeal. The withdrawal of the appeal raises significant concerns regarding the credibility and strength of the Applicant's claim of a substantial dispute over the debt. Regulation 17(6) of the Insolvency Regulations provides that the court may set aside a statutory demand if the debt is disputed on substantial grounds. However, the withdrawal of the appeal leaves the Applicant without a formal legal challenge to the debt, which weakens the claim of substantial dispute. It thus means there is no longer an active challenge to the debt.
10. A company is thus said to be unable to pay its debt when it fails to honour the statutory demand. The failure to act on the statutory demand herein is prima facie evidence of insolvency of the Applicant/ Debtor. It is upon the Debtor to adduce evidence to demonstrate that it is not insolvent and it is in a position to repay the debt.
11. Given the above reasons, I am not satisfied that there are sufficient grounds to set aside the statutory demand dated January 10, 2024. I dismiss the Notice of Motion application dated January 31, 2024 with costs to the creditor which I assess at 60,000.00 The Creditor may present the liquidation petition after 90 days of this order.

RULING DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Maiyo h/b for Mr. Omondi for Creditor/Respondent

Mr. Kiche for Debtor/Applicant

Court Assistant: Carlos

