



**Deltar M. N Properties Limited v MBA Construction Limited (Insolvency Notice E149 of 2023) [2025] KEHC 3330 (KLR) (Commercial & Admiralty) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3330 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
INSOLVENCY NOTICE E149 OF 2023  
JWW MONG'ARE, J  
MARCH 17, 2025**

**BETWEEN**

**DELTAR M. N PROPERTIES LIMITED ..... APPLICANT**

**AND**

**MBA CONSTRUCTION LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant has by a Notice of Motion Application dated 11<sup>th</sup> November 2023 moved this court seeking for the following orders:-
  - i. Spent
  - ii. That this Honourable Court be pleased to set aside and/or vacate the Statutory Demand dated the 2<sup>nd</sup> November 2023.
  - iii. That costs of the Application be borne by the Respondent.
2. The Application is supported by the grounds set on its face and the supporting affidavit of Mohammed Hussein Aress sworn on the 11<sup>th</sup> November 2023 and a further affidavit sworn by Asha Hussein on 20<sup>th</sup> May 2024. The Application is opposed and the Respondents have filed a Replying affidavit sworn by Ompraksh Thakar.
3. The Applicant urges the court to set aside the Statutory Demand and has raised various reasons why this should be done. The Applicant argues that the dispute herein is disputed and it arose pursuant to a JBC contract for the construction of two projects, namely, the Oak Residency and the Taji Residency which are now subject of arbitral proceedings before QS Mutuku appointed by the Chairman, Architectural Society of Kenya in accordance with the arbitral clauses found in the JBC contracts. The Applicant argues that both parties have submitted themselves to the arbitral process



and urge the court to halt the insolvency process sought to be commenced by the Statutory Demand Notice issued herein and subject matter of these proceedings.

4. The Applicant admits to having issued postdated cheques to the Respondent as part of the execution and performance of the JBC but argue that upon being dissatisfied by the quality of the workmanship of the works by the Respondent under the aforementioned JBC contract, issued a stop order and advised the Respondent not to bank the postdated cheques until the issues were comprehensively and conclusively addressed. The Applicant argues that in blatant disregard of their instructions, the Respondents proceeded to encash the postdated cheques and therein occasioning them harm and embarrassment and straining their relationships with their bankers.
5. The Applicant's insist that there exists a dispute between themselves and the Respondents which has properly been referred to arbitration and therefore the Statutory Demand Notice under the *Insolvency Act* is premature and not ripe for determination by this court. Subsequently, they urge this court to set it aside.
6. In the replying affidavit filed by the Respondent, the Respondent opposes the Application to set aside the Statutory Demand Notice. The Respondent argues that the same was necessary since the Applicant had failed to settle the outstanding debt and had resulted into stopping of the postdated cheques issued to the Respondent without a valid explanation or reasons. The Respondent argue that the arbitral process between the parties is distinct and separate and is not related to the issues being addressed by the Statutory Demand Notice or at all. The Respondent urge the Court to dismiss the Application and allow the winding up process of the Applicant on account its failure to settle their debts and or meet their financial obligations under the JBC contract.

#### **Analysis and Determination:-**

7. I have carefully considered the Application before this court and the supporting and further affidavit filed on behalf of the Applicant. Similarly, I have considered the replying affidavit filed in opposition to this application. In addition, I have also looked at the rival submissions filed the parties and I note that only one issue arises for determination by this court, to wit, whether this court should set aside or vacate the Statutory Demand Notice issued to the Applicant by the Respondents.
8. I note from the grounds of opposition filed by the Respondent that the Respondents challenges the validity of the Application to set aside the Statutory Demand and argues that the said application having been filed under Regulation 16 and 17 that relates to "Personal Bankruptcy" and is therefore incurably defective and that not even Article 159 of the *Constitution* cannot be used a panacea to correct the same. That the Statutory demand herein relates a debt due and owing by a company and the same ought to have been challenged under Regulation 10 of the Insolvency proceedings. While I agree with the argument that Article 159 of the *Constitution* is not a panacea and should not be used to cure all technical oversights, however find it necessary to deal with substantive issues raised by the application filed before this court. I will therefore allow the Debtor's quest to be allowed to correct the provisions under which this application is brought to reflect regulation 10 of the insolvency Regulations in place of Insolvency Regulations 16 and 17 as pleaded.
9. Both parties agree that indeed the dispute before this court arose out of dishonored cheques issued to the Respondent by the Applicant pursuant to a JBC contract between the two. It is the position taken by the Applicant that the cheques were stopped by it once the said contract was terminated before completion and they have since declared a dispute and referred the same to arbitration in line with the terms and conditions of the said JBC.



10. Black's Law Dictionary 11<sup>th</sup> Edition defines insolvency as follows;(1) the condition of being unable to pay debts as they fall due or in the usual course of business. (2) the inability to pay debts as they mature-also termed as failure to meet obligations; failing circumstance". The *Insolvency Act* identifies two key tests that may be used to determine whether a company is insolvent. The cash flow test is set out in Section 384(1) (c). which provides as follows: -

“ 384. The circumstances in which a company is unable to pay its debts

- (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.

- (2) A company is also unable to pay its debts for the purposes of this Part if it is proved to the satisfaction of the Court that the value of the company's assets is less than the amount of its liabilities (including its contingent and prospective liabilities).
- (3) The insolvency regulations may increase or reduce the amount specified in subsection (1)(a).”

11. From the above provisions it is quite clear that insolvency proceedings can only be sustained if it established that a company has met the threshold set out under section 384 above and that the onus is placed on the party moving the court to establish the state of insolvency.

12. The Court of Appeal in *Universal Hardware limited v African Safari club Limited* (2013) eKLR held as follows:-

“ the winding up court is not to be used for debt collecting purposes, nor is it to be used for the purpose of deciding a disputed debt. If a debt which forms a basis of a winding up petition is disputed on substantial grounds the court has to decide on the evidence before it whether to exercise its discretion to wind up the company.”

13. I have carefully considered the arguments put forward by the parties. I am satisfied that the debt herein although arising out of dishonoured cheques issued to the Respondent by the Applicant, is disputed



and I am further satisfied that, the matter having been referred to arbitration by the Applicant under the *Arbitration Act*, the court's jurisdiction in the present matter is limited.

14. In addition to the above, I also note that there has not been presented before this court evidence that the Applicant is insolvent and is unable to pay its debts, if called upon and where no dispute as to the debt exists. I therefore find merit in the application before this court and I allow it. The Statutory Demand issued by the Respondent to the Applicant on 2<sup>nd</sup> November 2023 is hereby quashed and set aside. Let the parties await the outcome of the proceedings before the arbitral tribunal to be concluded. Each party shall bear their own costs of this application. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2025.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Ngor holding brief for Ms. Wangui for the Applicant/Debtor.

Mr. Njuguna for the Creditor/Respondent.

Amos - Court Assistant

