



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Victorian Advertising Ltd v Property Reality Limited & 2 others (Insolvency Cause E063 of 2023) [2025] KEHC 5638 (KLR) (Commercial and Tax) (5 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E063 OF 2023**

JWW MONG'ARE, J

MAY 5, 2025

BETWEEN

VICTORIAN ADVERTISING LTD CREDITOR

AND

PROPERTY REALITY LIMITED 1ST DEBTOR

PROPERTY REALTY COMPANY INVESTMENTS LIMITED 2ND DEBTOR

BRIAN GACARI NGUNYI 3RD DEBTOR

RULING

1. By a Notice of Motion Application filed on 1st March 2024, the Applicants have moved this Honourable court under Sections 1A, 1B and 3A of the Civil Procedure Act, Section 384 of the Insolvency Act, Regulations 16 and 17 of the Insolvency Regulations, 2016, Regulations 15(4) and 77B(2) of the Insolvency (amendment) Regulations, 201, Order 51 Rule 1 of the Civil Procedure Rules; seeking the following orders:-
 1. That the Honourable Court be pleased to set aside the Statutory Demand dated 20th September 2023.
 2. That the Honourable Court be pleased to strike out the instant Petitioner.
 3. That the costs of this application be borne by the Petitioner.
2. The application is supported by the grounds set out on its face and the supporting affidavit of Brian Gacari Ngunyi, sworn on 1st March 2024. The Application is opposed and the Petitioner has filed a replying affidavit sworn by Susan Onchomba. Both Parties have filed written submissions on the directions of the Court.



3. The Applicant contends that the main issue for this court to determine is whether the Statutory Demand meets the legal threshold as set out in by the law on Insolvency and the Regulations thereunder. As set out, the Statutory Notice is an amalgamated notice that seeks to commence insolvency proceedings against a corporate entity and notify a natural person, the 3rd Debtor herein of the intention to commence bankruptcy proceedings against him. The Applicants argue that the said notice is defective for want of form as the same has not been signed by the Deputy Registrar as required by Regulations 15(4) and 77B(of the [Insolvency \(amendment\) Regulations, 2018](#)). The Applicant argues that this failure renders the Statutory demand illegal and irregular and hence it should be struck out.
4. In addition, the Applicant avers that the Statutory Notice does not meet the legal threshold set out by law under Regulations 16 and 17 of [Insolvency Regulations](#) that require the same to be endorsed by the Deputy Registrar before being served upon a debtor and as such it ought to be dismissed for want of form. In addition, the Applicants argue that the said demand and the subsequent petition has co-mingled two distinct and separate proceedings and is therefore nullity *ab initio*.
5. I have looked at the Statutory Demand issued on 20th September 2023. I note that the same is addressed to the three Debtors/Applicants and it reads in part as follows:- “.....Take Notice if we do not receive the full amount as referenced herein above, we have firm instructions to proceed and institute Insolvency(Bankruptcy) proceedings against yourselves without further notice to you as to the consequences that arise thereafter.”
6. I have equally looked through the Petition dated 19th October 2023 and note that the Petitioner prays for the following orders from the court:-
 - a. That the 1st and 2nd Debtors are hereby declared insolvent for the liquidation of both entities.
 - b. That the 3rd Debtor be declared bankrupt;
 - c. And such orders as may be necessary and just in the premises.
7. In opposing the present application, the Petitioner has urged the court not to be distracted by the arguments raised by the Applicants on the form. The Petitioner argues that there is an undisputed debt that arises out of a judgment from the courts that remains unpaid and that due notice having been served upon the debtors, the quickest way to get it settled was the move to declare both the two entities insolvent and have the 3rd debtor declared bankrupt. The Petitioner urges the court to dismiss the application and allow the statutory notice to stand as issued and let the petition to proceed to its logical conclusion.
8. I note that the [Insolvency Regulations](#) under Regulation 15 provide as follows in relation to commencement of Bankruptcy proceedings: -
 - “ 15. Creditor may apply for bankruptcy order in respect of debtor:-
 - (1) For the purposes of section 17 of the Act, the procedure for complying with or setting aside a demand is as provided under Regulations 16 and 17.
 - (2) The creditor's application for bankruptcy order shall be in form of a petition in Form 3 set out in the First Schedule and shall be accompanied by the following documents—



- (a) verifying affidavit which shall be in Form 4 set out in the First Schedule;
 - (b) proof of the debt which shall be in Form 5 set out in the First Schedule; and
 - (c) the application for appointment of trustee which shall be Form 9 of the First schedule.
- (3) The petition shall be preceded by a statutory demand and shall be in Form 6 set out in the First Schedule.
 - (4) The statutory demand in sub Regulation (3) shall be endorsed by the Deputy Registrar of the High Court before it is served on the debtor.
 - (5) The statutory demand specified in sub Regulation (3) shall be served on the debtor at least twenty one days before the filing of the petition.
 - (6) The service of the statutory demand shall be in accordance with the Civil Procedure Rules, 2010.
9. This process is governed by Part 111 of the *Insolvency Act* and it clearly sets it out as a separate and distinct process and is titled “Part III – Bankruptcy of Natural Persons -Division 1 — Bankruptcy: introductory provisions”. The procedure for moving the court for bankruptcy orders is as per section 17 of the Act.” Under these provisions, the law has also provided the manner and form for which these proceedings must take and the nature and form of a statutory demand, the law requires that the same be as set out under Form 6 that is to be found in the Regulations. I also note that the said form requires to be signed off by the Deputy Registrar before it is deemed a valid document capable of being served to commence bankruptcy proceedings.
10. The *Insolvency Act* under Part VI – Liquidation of Companies sets out the modalities of the processes to be followed in liquidation of companies. The said processes are to be found running from section 381 to 511 of the *Insolvency Act* and the specific provisions on how a party should move the court are set out under section 425 of the Act, and the mode is to as set out under Regulation 77B(2) (a) which provides as follows;- 77B. Liquidation by court (1) For the purposes of section 425 of the Act an application for liquidation shall be— (a) by way of a petition in Form 32C as set out in the First Schedule; and (b) accompanied by a verifying affidavit in Form 32D as set out in the First Schedule. (2) The petition for liquidation shall be accompanied by the following documents—(a) a statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness; and (b) a statement of financial position in Form 32 as set out in the First Schedule where necessary.”
11. I therefore agree with the arguments by the Applicant that both the statutory demand as set out herein and the Liquidation petition are incompetent both in form and substance. The processes are to be separate and distinct and should be commenced separately and in accordance with the provisions of the law set out thereunder.
12. As justice Ringera stated in the famous dicta in the case of ¹*Jambo Biscuits v Barclays Bank* (2002), Ringera J (as he then was) “And in light of the overall objective of insolvency law which deliberately shifted from the practice of liquidation which was comparable to a ‘Kiss of Death’¹; into rescue culture of viable businesses as a way of guaranteeing repayment of the debt and sustenance of the company



as a going concern; there is need for proportioned balance of interests of the parties.” I agree with the above reasoning in the above case that the purpose of the safeguards now to be found in the [Insolvency Act](#) and the Regulations, is to save businesses and not to kill them. I am persuaded that these safeguards are necessary in insolvency proceedings both for natural and legal person. I find therefore merit in the present application and will allow the same. Let the Petitioner comply with the provisions of the [Insolvency Act](#) and Regulations and file separate proceedings as envisioned by Section 17 and 425 of the [Insolvency Act](#). Each party shall bear their own costs.

13. It is ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2025

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

JUDGE

In the Presence of:-

1. Mr. O'makalwala for the Petitioner
2. N/A for the Debtors
3. Amos- Court Assistant

