Intraspeed Arcpro Kenya Limted v Mars Logistics Limited (Insolvency Cause E046 of 2023) [2025] KEHC 9979 (KLR) (Commercial and Tax) (4 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY CAUSE E046 OF 2023

RC RUTTO, J

JULY 4, 2025

BETWEEN

INTRASPEED ARCPRO KENYA LIMTED ..... CREDITOR

AND

MARS LOGISTICS LIMITED ..... DEBTOR

JUDGMENT

1. Before this court for determination is a Notice of Motion Application dated April 18, 2023. The Application is premised under the provisions of rule 16 (3) of the Insolvency Regulations and seeks the following orders:

    1. ... Spent;

    2. That the court be pleased to set aside the statutory demand dated 31st March 2023 issued by the creditor against the debtor;

    3. That the costs of this application be provided for.

2. The application is supported by the grounds on the body of the Motion together with the supporting affidavit sworn on 18th April 2023 by Hetal H. Gohil, the debtor's general manager. The gravamen of the application is that the creditor, the respondent herein, served the applicant with a statutory demand dated 31st March 2023. The statutory demand required the applicant to pay the respondent the sum of USD.34,853.95 being an outstanding amount as at 1st February 2023 owed to the respondent. The applicant contended that the said debt was genuinely disputed and it has never admitted to owing the said debt. Furthermore, the respondent had never filed any suit regarding the said amount nor was there judgment or a decree passed in its favor against the applicant ab initio. In its view, the statutory demand was an abuse of the process of the court since it did not precede any suit filed.

3. It was further averred that the respondent has continuously harassed the applicant with many threats with the intention to coerce it to pay the disputed debt. That the creditor is using the liquidation process to blackmail and arm twist the applicant to pay disputed debt. The applicant also raises issue with an outstanding credit note and set off which issues need to be determined by court before the respondent can proceed to execute through liquidation. Thus, they urged that the respondent is acting prematurely and maliciously so as to pressurize the applicant to pay a disputed debt.

4. Notably, in a further affidavit sworn on 18th October 2024, the applicant stated that they had filed suit in the Chief Magistrate Court at Milimani Commercial Case No MCCOMSU/E627/2024 Mars Logistics Limited vs Intraspeed Arcpro Kenya Limited and another whereby summons to enter appearance had been served upon the creditor. That it is the Chief Magistrate court that is proper forum and with the requisite jurisdiction to determine who owes and how much. In the circumstances, it was urged that this court ought to pave way and allow that matter to proceed by staying the statutory notice.

5. The applicant prayed that the application be allowed for the following reasons: its constitutional right to be heard under Article 50 should not be taken away from it; allowing the statutory demand to stand would be tantamount to the applicant being condemned unheard; the respondent sat as a judge and litigator by invoking the liquidation proceedings without first filing a suit and obtaining a decree; and that the insolvency proceedings were an abuse of the process of the court.

6. The application was vehemently opposed on ground that it is an abuse of the court's process. Through the replying affidavit sworn on 18th May 2023 by Tony Van Aswegen, the respondent's executive director, the respondent stated as follows: between September 2020 and January 2021, the applicant sought and was granted logistics and customs clearance services from the respondent. In return, the applicant was to settle the invoices raised by the respondent from time to time. The applicant settled some of the invoices leaving a balance of USD.34,853.95. The respondent deposed that in fact, the applicant admitted indebtedness and proposed a payment plan as stated in the correspondence between the parties. The respondent thereafter sent several demand letters dated 27th September 2021 and 28th February 2023 but the applicant has failed to honor those demands. It is for this reason that the respondent instituted the present proceedings seeking to recover the outstanding debt.

7. The respondent urged this court to dismiss the Application for reasons that: the liquidation proceedings were not an abuse of the process of the court as there is no requirement under the law obliging a creditor to only invoke this process as a means of last resort; the fact that the debt amount, and not the debt, was being disputed was not a ground to set aside a statutory demand; in any event, the applicant was duty bound to take the necessary steps within the timelines set by statute; and since there was no counterclaim, set-off or cross demand exceeding the debt claimed and no security furnished in respect to the debt, this application was an abuse of the court process.

8. The application was disposed of by way of written submissions that were orally highlighted. The applicant's written submissions dated 18th July 2023 argued that it had a constitutional and natural right to be heard by dint of Articles 47, 48 and 50 of *the Constitution*. It summarized the facts set out in its application to urge this court to allow the application as it was being harassed by the respondent with threatened litigation. Citing several decisions, the applicant propositioned that the respondent's remedy lay in filing an appropriate claim as required by law and to only invoke this process at the execution stage. While urging this court to allow the application, it submitted that the legal system should not be abused to arm-twist people to settle farfetched claims.

9. In its written submissions dated 11th August 2023, the respondent summarized the facts in its response to submit that looking at sections 384 (1) (a) and 425 of the *Insolvency Act* and the decision of the Court of Appeal in Prideinn Hotels & Investments Limited vs. Tropicana Hotels Limited [2018] eKLR, wherein it was held that it was well within its rights to file the liquidation proceedings without filing another suit first. Finally, it reiterated that the debt was not disputed on any substantial, bona fide or reasonable grounds. The application was therefore an abuse of the process of the court. For those reasons, the respondent prayed that the application be dismissed with costs.

10. I have considered the application, the affidavits and the annexures thereto as well as the parties' written submissions, and analyzed the law. The applicant's position is that the respondent ought to have filed a suit to determine liability and to what extent. Thereafter, after securing a decree it is at this juncture that the statutory demand ought to be issued. He opined that consequently, the present insolvency proceedings are inchoate.

11. Section 424 (1) (e) of the *Insolvency Act* provides that a company may be liquidated by the court if the company is unable to pay its debts. Such an application is governed by the provisions of section 425 of the Act. Under section 384, a company is unable to pay debts in any of the following circumstances:

> "(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)."

12. The statutory demand in question was filed and premised on the provisions of section 384 (1), 424 (1) (e) and 425 (1) (b) of the *Insolvency Act*. It seeks the sum of USD.34,853.95 being the outstanding amount as at 1st February 2023 owed pursuant to customs clearance services offered to the applicant. In the same statutory demand, the respondent warned that if the applicant failed to pay the afore-stated sum, it would procure a liquidation order.

13. The applicant invoked Regulation 16 (3) of the Insolvency Regulations which provides that the debtor may apply for an order to set aside the statutory demand within twenty-one days from the date of the service on the debtor of the statutory demand; or if the demand has been advertised in a newspaper, from the date of the advertisement's appearance or its first appearance, whichever is the earlier.

14. Though no specific provisions govern setting aside a statutory demand on a juristic person, Regulations 16 and 17 deals with natural persons. They give proper guidance on the principles applicable in setting aside a statutory demand. (See Avoveg Health Kenya Limited vs. Financial Access Commerce And Trade Services (K) Ltd [2022] KEHC 11320 (KLR). Similarly, the court in In the matter of Libyan Arab African Investments Company Kenya Limited [2021] eKLR had this to say:

> " Since it is common ground that PART V of the Regulations apply to personal bankruptcies and not liquidations or insolvencies of companies, does this mean that a company has no recourse when a statutory demand has been served upon it? I do not think so. I say so and repeat the court's holding in DAC Aviation (EA) Limited v Stevenson Kibara Ndung'u & 8 others (supra) that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the Regulations and that the factors underlined in Regulation 17(6) of the Regulations governing the exercise of discretion to strike out a statutory demand in case of bankruptcy are equally relevant in the case of insolvency of a Company."

15. The Court of Appeal in Universal Hardware Limited vs. African Safari Club Limited MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, gave the following useful criterion when dealing with an application of this nature:

> " The thread running through these authorities is that in entertaining a petition to wind up a company on account of non-payment of debts, the court must be satisfied that the debt is not disputed on substantial grounds and is bona fide. If it is, then the winding-up proceedings are not the proper remedy. The substantial dispute must be the kind of dispute that in an ordinary civil case will amount to a bona fide, proper or valid defence and not a mere semblance of a defence. It is not sufficient for a company to merely say for instance that we dispute the debt. The company must go further and demonstrate on reasonable grounds why it is disputing the debt."

16. In this case, the applicant argued that the respondent should have filed a suit for debt recovery and used the liquidation proceedings for execution. Additionally, the applicant maintained that the debt in question was disputed. As a result of receiving the statutory notice, the applicant initiated legal proceedings before the Chief Magistrates Court, seeking an order directing both parties to reconcile their accounts to establish the exact amounts owed. Once determined, the applicant contends that the accounts between the plaintiff and defendant should be considered fully settled. This suit is still pending determination.

17. The court finds that the filing of the suit before the Chief Magistrates Court alters the status of the claimed debt, as it is now a disputed matter awaiting judicial resolution. Since the statutory demand seeks payment of an otherwise liquidated claim that is currently subject to litigation before a different court, it can no longer form the basis of the statutory notice. The applicant maintains that it disputes the debt amounts since it is also owed amounts by the respondent which, if taken into account settles the debt. Allowing the statutory demand to remain under the circumstances, in effect, would essentially sanction payment in favour of the respondent while the dispute is still unresolved. This Court, in light of the foregoing, cannot interrogate the merits of the dispute particularly the extent of the reconciliation to determine whether the applicant still has a debt owed to the respondent.

18. Furthermore, a statutory demand serves as a formal notice to a debtor, urging them to fulfill their financial obligations before a creditor pursues available legal remedies. When a debt is contested, it

is only fair and just to first establish the actual amount owed through due process. As a matter of procedural prudence, this court finds it appropriate that any challenge to a statutory demand be raised within liquidation proceedings, as the demand itself does not become legally binding until a liquidation petition is filed before the court. At any rate a statutory demand is just but a demand for payment that does not contain all facts. The debtor remains at liberty to dispute the demand, indicating the basis of such dispute.

19. Turning to the second, issue, I do agree with the respondent that liquidation proceedings do not have to be invoked as a remedy of last resort. As long as the creditor is able to demonstrate that the debt is undisputed and there exists sufficient reason to support the liquidation process, it is not barred by law to institute the proceedings at any stage for debt recovery. Indeed, the Court of Appeal in the decision of Prideinn Hotels & Investments Limited vs. Tropicana Hotels Limited (Supra) held similarly in the following terms and this court takes the same approach:

> " This was clearly the case herein since the appellant did not make any payments after being served with a notice of demand by the respondent. Hence the respondent was entitled to bring a petition for liquidation of the appellant on the ground of its inability to pay its debt. Equally, I find no fault on the part of the learned Judge for issuing the liquidation order. There is no requirement under the *Insolvency Act* or the *Companies Act* which stipulates that liquidation of a company should be as a last resort. Liquidation is one of the options under the *Insolvency Act* which a creditor such as the respondent in the case, could pursue to secure payment of a debt, especially a debt that remains unpaid for several years and in respect of which the appellant has been given adequate time, opportunity and indulgence."

20. Accordingly, I find merit in the Notice of Motion dated April 18, 2023 and set aside the statutory demand dated March 31, 2023 issued by the creditor against the debtor. As parties are still engaged in litigation before the Chief Magistrates Court over the debt, I make no order as to costs.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 4TH DAY OF JULY, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Creditor

.....Debtor