Kenya Hospital Association t/a The Nairobi Hospital v Opticom (K) Limited (Insolvency Notice E133 of 2024) [2025] KEHC 11069 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11069 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

INSOLVENCY NOTICE E133 OF 2024

PM MULWA, J

JULY 24, 2025

BETWEEN

KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI HOSPITAL ..... APPLICANT

AND

OPTICOM (K) LIMITED ..... RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 9th July 2024 brought by the Applicant, Kenya Hospital Association t/a The Nairobi Hospital, under the provisions of Order 40 Rule 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Article 50 of *the Constitution*. The Applicant seeks a stay of further proceedings against it, pending resolution of the parties' dispute through arbitration, as provided for in their contractual agreement.

2. The application is supported by the affidavits of Mr. Kelvin Odhiambo Onguka and Mr. Gilbert Nyamweya. The Applicant avers that the Respondent issued a statutory demand dated 24th June 2024 claiming Kshs. 35,219,747.74 pursuant to a contractual dispute arising from installation works relating to pedestrian scanning equipment. It is the Applicant's case that the amount is disputed and that there are issues regarding the quality and performance of the equipment supplied, which have hindered amicable settlement. The Applicant further argues that the contract contains an arbitration clause which ought to be respected, and that allowing insolvency proceedings to proceed would be premature and prejudicial. It is also claimed that no payment certificate was received to justify the sum demanded.

3. In opposition, the Respondent, through its General Manager, Mr. Robert Chege, swore a replying affidavit dated 6th August 2024. He deposes that the application is frivolous, vexatious, and an abuse of court process. He contends that under Regulation 17(6) of the Insolvency Regulations, the mere

existence of an arbitration clause is not sufficient to stay insolvency proceedings. He asserts that the debt is undisputed and that the Applicant has failed to invoke the pre-arbitration mechanisms as provided under the 2017 FIDIC Red Book contract. He also avers that the Applicant has not activated the Dispute Avoidance/Adjudication Board (DAAB) or engaged the Engineer for a decision, which are prerequisites under Clause 21 of the FIDIC contract, before arbitration can be invoked.

4. The application was heard by way of written submissions. I have considered pleadings and submissions filed by parties through Counsel. The issue for determination is whether this suit ought to be stayed and the dispute referred to arbitration.

5. The Applicant seeks to stay proceedings herein and urges the court to refer the dispute to arbitration contemplated in the Contract and as envisaged by section 6 of the *Arbitration Act*.

6. The Respondent argues that any dispute between the parties must go through the three-pronged dispute resolution mechanism provided for by the contract and the FIDIC, namely the Engineer's determination, the DAAB's Decision and subsequently Arbitration, which the applicant has not exhausted.

7. Section 6(1) of the *Arbitration Act* provides as follows:

> A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
>
> a. that the arbitration agreement is null and void, inoperative or incapable of being performed; or
>
> b. that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

8. Additionally, Regulation 17(6) of the Insolvency Regulations, 2016 states:

> The Court may set aside a statutory demand if the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or if the debt is disputed on grounds which appear to the court to be substantial.

9. Thus, the relevant inquiry in this matter is not merely the existence of an arbitration clause, but whether there exists a genuine dispute warranting reference to arbitration, and whether the arbitral process has been properly invoked under the contractual provisions, particularly where the dispute arises under a specialized form such as FIDIC.

10. The Applicant asserts that the debt forming the subject of the statutory demand is disputed on the basis of dissatisfaction with the equipment supplied and the lack of a valid payment certificate. Conversely, the Respondent has exhibited Payment Certificate No. 6, issued under the FIDIC contract, and avers that despite several demands, the Applicant failed to remit payment. Further, the Respondent submits that the Applicant has not issued a Notice of Dissatisfaction, sought a DAAB decision, or issued a Notice of Intention to Arbitrate in the manner prescribed under Clause 21 of the 2017 FIDIC Red Book.

11. It is common ground that the parties' contract is governed by the FIDIC Red Book, 2017 edition, which provides for a structured and sequential dispute resolution framework. Clause 21 requires that the parties appoint a DAAB at the start of the contract and remain in place for the duration of the

contract, with a key role of avoiding a dispute between the parties. Secondly, it is to appoint a dispute board on an ad hoc basis when a dispute between the parties arises to resolve the dispute, and its appointment ceases when it has given a decision on the dispute. Where a party is dissatisfied with the decision of the DAAB, the provision of the clause encourages the parties to settle the dispute amicably without the need for arbitration. Thereafter, the parties may resort to arbitration.

12. It is well settled that where a party has failed to activate pre-arbitral mechanisms agreed upon, the right to arbitrate is not ripe. While the existence of an arbitration clause is not in dispute, its invocation must be in accordance with the contract. The Applicant has failed to demonstrate any steps taken toward complying with the contractual dispute resolution process. This undermines its plea for a stay pending arbitration.

13. Further, although liquidation is indeed a drastic measure as observed in Matic General Contractors Ltd v Kenya Power & Lighting Co. Ltd [2001] LLR 4837 (CAK) the Court must balance this concern against the statutory rights of a creditor.

14. In the circumstances, I find that the Applicant has not shown any substantial ground to challenge the statutory demand. The debt has been certified under the contract; no counterclaim or set-off has been formally lodged; and no dispute resolution mechanism has been activated. The mere assertion of dissatisfaction does not, in the absence of concrete steps or documentation, amount to a bona fide dispute within the meaning of Regulation 17(6) of the Insolvency Regulations, 2016.

15. In the result, I find that the Applicant has failed to demonstrate that there exists a genuine dispute capable of reference to arbitration under the contract as read with the FIDIC Red Book. The arbitration clause, while valid, has not been properly invoked. The statutory demand remains unchallenged on substantial grounds, and this Court is not persuaded that a stay is warranted.

16. Accordingly, the Notice of Motion dated 9th July 2024 is hereby dismissed with costs to the Respondent.

    It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Onguka for Applicant

Mr. Waigwa for Respondent

Court Assistant: Carlos