



Cheyne Row Investment Limited v Malplast Industries Ltd (Under Administration) (Insolvency Cause E024 of 2022) [2024] KEHC 84 (KLR) (Commercial and Tax) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 84 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY CAUSE E024 OF 2022
A MABEYA, J
JANUARY 17, 2024**

BETWEEN

CHEYNE ROW INVESTMENT LIMITED APPLICANT

AND

MALPLAST INDUSTRIES LTD (UNDER ADMINISTRATION) RESPONDENT

RULING

1. Before Court is the application dated 24/8/2022 by the applicant. It is brought, *inter-alia*, under Article 159 of the Constitution of Kenya 2010, sections 427(3)&4, 384 of the insolvency Act, rule 10 & 77B of the Insolvency regulations, section 1A, 3 and 3A of the Civil Procedure Act.
2. The application seeks a declaration that the statutory demand dated 5/8/2022 by the respondent is a nullity and offends the provisions of the Insolvency Act. That the respondent be barred from undertaking further insolvency proceedings against the applicant pending resolution of the dispute.
3. The application is supported by the grounds on the face of it and the supporting affidavit of Dhrupey Sudhir Shah sworn on 24/8/2022. The applicant and the respondent executed a Contract Manufacturing Agreement dated 1/10/2019 by which the applicant would utilize the respondent's machinery for production.
4. The applicant contended that on 26/7/2022, the respondent demanded from the applicant a sum of Kshs. 46,070,136.64 being the utility costs and conversions met by the respondent on behalf of the applicant. That the respondent issued a statutory demand notice to the applicant demanding Kshs 34,475,213.69 for the amount owing with respect to the invoice numbers; MIL00015, MIL00016 and MIL00017.



5. The applicant contended that the statutory demand did not contain a case number and had not been endorsed by the deputy registrar therefore it was premature and wanting in substance and form. The applicant further faulted the respondent for issuing contradicting figures in its demands in a view of forcing the applicant into performing unknown obligations. That the debt was disputed and not proved hence should be subjected to civil proceedings.
6. The respondent opposed the application vide a replying affidavit dated 4/11/2022 sworn by the administrator of the respondent. It was contended that the present application was flawed as it offends section 560(1)(d) of the *Insolvency Act* (“the Act”) which provides that a person can only bring an action against a company under administration if it obtains consent from the court or the administrator.
7. The administrator averred that the directors and shareholders of the applicant and the respondent were the same. That the respondent, Malplast had diverted all of its business to the applicant and therefore all the Malplasts customers were fraudulently diverted to the applicant. That was a deliberate intention by the directors of the respondent to divert Malplast’s business to the applicant. That the amount claimed in the statutory demand was a debt owed by the applicant to the respondent for the conversion costs and cost recharges.
8. That by a letter dated 16/6/2022, the applicant requested United Credit Limited to pay Kshs 21,838,875.62. Further, under the Contract Manufacturing agreement dated 1/10/2019, the applicant was bound to pay Kshs. 13,636,338.07. That the statutory demand was valid as set out in the prescribed form 32E of the Insolvency regulations 2016.
9. The respondent raised a preliminary objection dated 15/9/2022 seeking to strike out the application on the grounds that it offends section 560(1) (d) of the Act for being filed without leave of court or approval from the administrator.
10. The application was canvassed by way of written submissions. It was the applicant’s submissions that the applicant did not require the approval of the court or consent of the administrator to bring the present application. That it did not commence legal proceeding against the respondent rather it was a response to the statutory demand meaning that the respondent commenced the proceedings.
11. That the applicant had a cross demand on the respondent that exceeded the debt specified in the statutory demand. That the company could not be wound up if the debt was disputed. It was the applicant’s submissions that the administrator made allegations concerning the Contract Manufacturing agreement which is *prima facie* evidence that a dispute exists. That regulation 17 of the Regulations gives the power to set aside a statutory demand if the debtor has a counterclaim, setoff or cross demand which equals or exceeds the debt.
12. On its part, the respondent submitted that the application was defective as it was not filed with the consent of the administrator or with the approval of the Court. That the respondent was a company under administration and therefore was protected by the moratorium on legal proceedings. It was further submitted that a statutory demand was a test of solvency and did not constitute commencement of proceedings. That the counterclaim did not raise triable issues as there was no evidence on its validity or existence.
13. I have considered the pleadings and the submissions. There are two issues for determination. The first issue is whether the preliminary objection is meritorious and the second whether the statutory demand should be set aside.



14. In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, a preliminary objection was defined as one that consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. It is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.
15. The respondent raised the preliminary objection on the ground that the application offended section 560 (1) (d) of *the Act*. The section makes it mandatory for any party with the intention to initiate or continue any proceedings to seek the consent of the administrator or approval of the Court.
16. In *Lambart Lwanga Ogoci & 4 others v Ponginambart angipalli Venkata Ramana Rao* [2022] eKLR, the court held: -

“From the foregoing, several matters come to the fore. That the primary role of the Insolvency Court is to enforce the objectives of the Act as set out in section 522 of that Act. That in all proceedings under the Act, the primary concern is to uphold those objectives. That primary in those objectives is to ensure that, the company under administration is not unnecessarily harassed by way of legal proceedings and or obliterated by uncoordinated disposal of its assets. Further, that all matters concerning a company under administration are under the watchful eye of the Insolvency Court. It is for that reason that before any proceedings are under-taken against a company under administration, the Court has to give its nod or the consent of the administrator, who is an agent of the court.”
17. From the foregoing, it is clear that what is barred is the fact of commencing proceeding against a company under administration. In the present case, these proceedings cannot be said to have been commenced by the applicant. What the applicant is doing is just defend it self by challenging the Statutory Notice. Accordingly, the preliminary objection is without merit and is hereby dismissed with costs.
18. The statutory notice has been challenged on two grounds, that it is not in accordance with the law and that it is baseless, that the debt is disputed and that there is counterclaim which equals or exceeds the amount demanded.
19. On the efficacy of the Statutory Demand. I have looked at it. I see nothing in it that violates the regulations. A slip deviation does not make such a Notice to be incompetent. The same will be a mere technicality that is curable under Article 159 of the *Constitution*. Accordingly, I reject that ground and hold that the Notice is valid as it contains all the legal requirements of a statutory notice.
20. The other ground is that the debt is disputed and that there is a counterclaim that equals or is in excess of the amount demanded. In my understanding, the defence of ‘amount is disputed’ is not a mere dispute. The debtor must give cogent reasons for disputing the debt. It must be shown that; either there is no contract between the parties, if there is the amount demanded is not due or that the same has been paid.
21. In the present case, the existence of the contract is not denied. The amount has been demanded yet the debtor does not show why the same is not due. A mere denial would not be sufficient to displace the Notice. In this case, I find that the allegation that the debt is disputed is akin to a mere denial in a civil suit which cannot amount to a defence. I reject the same.
22. On the counterclaim, likewise, a debtor must put forward materials that support the allegation that a claim against the creditor exists. A debtor must specify the actual sum being counterclaimed and the



basis of such a counterclaim. A mere allegation that there exists a counterclaim without particulars or sufficient particulars and material to support the same won't do.

23. As submitted for the respondent, the issuance of a statutory notice is a serious test on the solvency of a debtor. Mere unsubstantiated allegations of 'the debt is disputed' or that 'there is counterclaim in excess of the amount demanded' would not do. The debtor must put forward sufficient material to support those allegations.
24. In the present case, the particulars of the alleged amounts were not set out either in the Motion nor the affidavits in support. Neither the amount of the counterclaim nor the materials constituting the same was disclosed. On my part, I find none on record.
25. Accordingly, the application dated 24/8/2022 is without merit and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

