



**Thuku v Atlantis Finance Limited (Insolvency Cause E007 of 2022)  
[2024] KEHC 1560 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY CAUSE E007 OF 2022  
FG MUGAMBI, J  
FEBRUARY 16, 2024  
IN THE MATTER OF ATLANTIS FINANCE LIMITED**

**BETWEEN**

**VINCENT WAWERU THUKU ..... CREDITOR**

**AND**

**ATLANTIS FINANCE LIMITED ..... DEBTOR**

**RULING**

1. Before the Court is a Notice of Motion application dated 10<sup>th</sup> May 2023, brought under Regulation 10 and 17 (6) of the *Insolvency Regulations*, 2016, Sections 3 and 384 of the *Insolvency Act* and Article 159 of the *Constitution*. The applicant seeks the following orders:
  - i. That this Honourable Court be pleased to give leave to the respondent/ applicant herein to file this application out of time.
  - ii. That this Honourable Court be pleased to set aside the statutory demand dated 31<sup>st</sup> October, 2022.
  - iii. That costs of this application be provided for.
2. The application is supported by the affidavit sworn by the debtor's General Manager, Robert Ndwiga on 10<sup>th</sup> May 2023. The applicant's case is that the statutory demand of 31<sup>st</sup> October 2022 is fatally defective as it is based on a disputed amount, that the applicant has been proactively engaged in sincere negotiations to settle the acknowledged debt but the respondent has resolved to use the insolvency proceedings as a coercive measure and that the applicant's asset value significantly surpasses its liabilities. For these reasons the applicant argues that it would be unjust for the statutory demand to precipitate insolvency proceedings.



3. In response to the application the respondent filed a replying affidavit sworn on 20<sup>th</sup> June 2023. He confirms extending a loan of Kshs. 1,500,000/= to the applicant, at a monthly interest of 2% for one (1) year. By June 22, 2022, the outstanding amount was Kshs. 2,242,495.91. The respondent highlighted that the applicant's assertion that it had ceased lending and its proposal dated 8<sup>th</sup> May 2023 for a debt swap was belated and insincere, having been written way after the service and publication of the statutory demand.

### **Analysis**

4. I have carefully considered the application, rival affidavits and parties' respective submissions and authorities. The issues for determination are whether the applicant has made out a case for grant of leave to file the instant application out of time and made out a case for setting aside the statutory demand.
5. On the first issue, the respondent argues that the application is not properly before the court as the applicant did not seek leave to file it outside the statutory timelines. The applicant responded by stating that the respondent had not shown how he would be prejudiced if the application was allowed even though out of time, highlighting that in fact there is a prayer for leave on the face of the application.
6. Regulation 16 of the Insolvency Regulations 2016 is very clear on the timelines for filing an application to set aside a statutory demand. It provides that the same should be filed:
  - a. within twenty-one days from the date of the service on the debtor of the statutory demand; or
  - b. 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."
7. Regulation 16(2) further provides that:

“Subject to any order of the Court under regulation 17(7), time limited for compliance with the statutory demand shall cease to run from the date on which the application is lodged with the Court.”
8. The evidence on record shows that the statutory demand notice dated 31<sup>st</sup> October 2022 was served upon the debtor through a letter dated 16<sup>th</sup> November 2022 and published in the dailies on 6<sup>th</sup> December 2022. It was not until 10<sup>th</sup> May 2023, which is 175 days outside of the permitted timelines that the applicant has approached the court seeking to set aside the statutory demand. I concur with abundant judicial pronouncements from this court on the need for timelines to be followed in the interest of the administration of justice. I find the delay to be inordinate and I note that the applicant has not given any explanation for the same.
9. It is not enough for the applicant to simply state that since the creditor has not demonstrated the prejudice to be occasioned if leave is granted, then such leave ought to be granted. I would allow the application only for the purpose of finality and resolution of the question before the court and even more, since the respondent has not pleaded any prejudice that he may suffer by the court allowing the application.
10. That said, Regulation 17(6) is relevant for purposes of providing the legal framework on setting aside a statutory demand. This should be done if:



- i. the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
  - ii. the debt is disputed on grounds which appear to the Court to be substantial;
  - iii. it appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
  - iv. the Court is satisfied, on other grounds, that the demand ought to be set aside.”
11. These grounds are well settled in judicial precedent. The Court of Appeal in *Universal Hardware Limited V African Safari Club Limited*, (MSA CA Civil Appeal No. 209 of 2007) [2013] eKLR summarized these principles when it held that:

“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.”

12. I also refer to the case of *Flower City Limited V Polytanks & Containers Kenya Limited*, (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) (Commercial and Tax) (22 February 2021) (Ruling). This case set out the parameters that must be established by a debtor to warrant the setting aside of a statutory demand. The court held that:

“Simply put, a debtor must demonstrate the existence of a genuine dispute. Though it may not be possible to provide a closed list of the elements of a genuine dispute, the applicant must:

- i. Show a plausible contention requiring investigation;
- ii. Be bona fide, genuine and real;
- iii. Be in good faith and show a prima facie plausibility;
- iv. Truly exist in fact, and contain a serious question to be tried;
- v. Be something more than mere bluster or mere assertion;
- vi. Be a claim that may have some substance;
- vii. Have a sufficient degree of cogency to be arguable;
- viii. Have objective existence; and
- ix. Have sufficient factual particularity.”

13. Turning to the instant matter, it is not disputed that the proceedings herein arise from a Loan Note Agreement dated 13<sup>th</sup> February 2020, between the applicant, which is a small and medium enterprise (SMEs) financier, and the respondent, an investor. The bone of contention is on the outstanding amount which is stated to be at Kshs. 2,241,495.91 by the respondent versus Kshs. 1,788,750/=



according to the applicant. This dispute on the exact figures, according to the applicant, warrants the setting aside of the statutory demand.

14. The applicant disputes the debt on the grounds that the creditor has purported to compound his interest yet under paragraph 3 of the Loan Note Agreement, the interest was at a flat rate of 2% per month and that the creditor has purported to seek interest for almost 3 years, yet the term of the agreement was for 365 days.
15. What the applicant does not seem to acknowledge is that the Loan Note Agreement also stipulates at paragraph 3 that in the event of default in payment of interest, the lender shall have the right to change the rate of interest by giving a seven days' notice in writing to the borrower. The applicant has not denied that such notice was served on it and therefore it is my finding that the respondent was entitled to vary the loan interest rate as per the agreement between the parties.
16. In any case, the applicant admits to defaulting in the loan advanced. At paragraph 8 of the affidavit in support of the application, the applicant's General Manager states that he was aware that the applicant owes the respondent the amount of Kshs. 1,788,750/=. Despite the admission, the debtor has not made any payments or offered a proposed payment plan towards offsetting this amount despite being called upon severally to make good the debt in vain.
17. The applicant appears to explain away the default as a result of the adjusted monthly bond yield rate from 2% to 1.5% per month in May 2021 due to the adverse impact of the COVID-19 pandemic on the applicant's business. The applicant asserts that the respondent was informed about the applicant's predicament vide a letter dated 4<sup>th</sup> May 2021. This is denied by the respondent. I have looked at the said letter and I note that it is addressed to Partners of Atlantis and not to the respondent and in turn, there is no evidence that the said letter was sent to or received by the respondent. In the absence of any proof that there was consent between the parties to restructure the facility, this explanation does not shield the applicant from paying up the defaulted monies.
18. The applicant also submits that there is security which exceeds the value of the debt and which it was willing to have sold so as to recover the debt. In its application the applicant attached some title documents, official searches and charges executed by borrowers in its favour for monies that it had lent out. The applicant also attached a valuation report in respect of a parcel of land being Ngong/ngong/19793/ in Kajiado County for part of the securities valued at Kshs. 4,500,000/=. The said property belongs to Edwin Njeru Gichovi and was charged to the applicant in 2016.
19. The applicant relies on these securities and contends that in order to prove that the applicant company is truly insolvent, the respondent ought to have pursued these alternatives before rushing to have the applicant declared insolvent and in bad faith.
20. The issuance of a statutory demand should be understood as a test of solvency. That is why one of the grounds that the court may apply to set aside a demand is where it appears that the creditor holds some security in respect of the debt claimed by the demand. The securities annexed by the applicant are not securities held by the respondent in respect of this demand. They are held by applicant with respect to other third parties and the details of the loan transactions are not before the court.
21. Additionally, the applicant highlighted that it is in the process of exercising its statutory power of sale in respect of these securities. The applicant exhibited a letter dated 8<sup>th</sup> May 2023, proposing a debt swap with any of the secured properties. The court notes that the principal amount was payable to the creditor at the end of one year, being 12<sup>th</sup> February 2021. To date, the applicant remains in default. The debtor has not produced any evidence showing what steps it has taken or the progress in realizing the



securities that it holds, towards offsetting its debt to the creditor. As such, I am inclined to agree with the creditor that the debtor's letter dated 8<sup>th</sup> May 2023 was an afterthought.

22. In the absence of any bank statements or financial reports to support the claims of financial solvency by the applicant, and in the background of the circumstances discussed herein, I am not persuaded that the applicant has satisfied the threshold for granting of this application.

**Determination**

23. Accordingly, the application dated 10<sup>th</sup> May 2023 is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUGAMBI**

**JUDGE**

