



**Agina & Associates Advocates v Nkediénye (Insolvency Cause
E001 of 2022) [2024] KEHC 5460 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 5460 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
INSOLVENCY CAUSE E001 OF 2022
SN MUTUKU, J
APRIL 11, 2024**

BETWEEN

AGINA & ASSOCIATES ADVOCATES APPLICANT

AND

DAVID OLE NKEDIENYE RESPONDENT

RULING

1. Pending before this court are two applications. There is a Notice of Motion dated 6th June 2022 and filed on 22nd June 2022. It is brought by the applicant herein seeking stay of proceedings in this matter pending hearing and determination of this application; that this court does issue an Amended Statutory Demand in terms of the drafts to the application.
2. The second application is dated 8th September 2022 and filed on 14th September 2022. It is brought by the Respondent. It seeks to set aside this suit and the corresponding statutory demand dated 8th August 2022 and such further orders or directions that this court may deem fit to grant as well as costs.
3. On 15th March 2023, the Respondent filed a Notice of Preliminary Objection (PO) dated 3rd March 2023. It is that PO that is subject to this Ruling as directed by this court on 16th January 2024 that the PO be disposed off first through written submissions.

Notice of Preliminary Objection

4. The PO has raised seven (7) grounds as follows:
 - i. The Creditor's Application is not properly before this Honourable Court pursuant to sections 15, 16, 17 and 18 of the *Insolvency Act* 2015 and the Insolvency Regulations 2016.



- ii. There is a pending application by the Respondent herein seeking to set aside the Statutory Demand dated 8th September 2022 which Application is still pending before this Honourable Court in respect of sections 16 and 17(2)(d) of the *Insolvency Act* 2015.
 - iii. That the pending Application by the Respondent herein seeking setting aside the Statutory Demand dated 8th September 2022 is scheduled to come up in court for Mention on 13th March 2013.
 - iv. There is no order dismissing or otherwise staying the prosecution of the pending Application by the Respondent seeking to set aside the Statutory Demand, that has been made by this Honourable Court to necessitate filing of the present Creditor's Petition dated 14th November 2022 as envisaged under section 17 of the Insolvency Regulations 2016.
 - v. In compliance with section 16(2) of the *Insolvency Act* 2016 the Court has a general power to dismiss this present Creditor's Petition herein or to stay proceedings herein on the ground that a requirement of the *Insolvency Act* or the Insolvency Regulations has not been complied with in a material respect, there being a pending Application by the Respondent dated 8th September 2022 herein to set aside the Statutory Demand, which Application this Honourable Court is yet to pronounce itself on.
 - vi. Consequently, this Honourable Court is estopped from exercising its jurisdiction over the Creditor's Petition until the Court determines the Respondent's pending Application dated 8th September 2022 seeking to set aside the Statutory Demand as provided under section 17 (2)(d). The Petitioner therefore jumped the gun by filing the present Creditor's Petition.
 - vii. The Creditor's Petition dated 14th November 2022 is legally flawed, incurable, defective and irredeemable ab initio. The Respondent argues that the Petition cannot be sustained or remedied even through amendments and prays that it be struck out with costs.
5. On 19th March 2024 both Mr. Agina, learned counsel for the Petitioner/Applicant and Ms Kibare, learned counsel for the Respondent informed the Court that they had each filed their submissions. This court reserved ruling for 11th April 2024. I have noted that only the submissions by the Applicant are in the court file.

Applicant's Submissions

6. The Submissions by the Applicant refer to Creditor's Grounds of Opposition which I did not find in the court file. The Applicant has submitted that the PO by the Debtor does not state whether it is founded on law or facts. The Creditor cited *Mukisa Biscuits Co. Ltd v West End Distributors Ltd* (1969) EA where a PO was discussed to the effect that "a PO raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."
7. It was further submitted that as stated in the Supreme Court decision of *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 others [2014]* eKLR, "A preliminary objection 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."
8. The Applicant has urged this court to strike out the pending application by the Respondent for being an abuse of the court's process. He relied on *Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 others (2009)* eKLR, among other authorities found in their submission to support their case that the application by the Debtor is an abuse of the court process.



Determination

9. I have considered the PO. As pointed out, there are no submissions in support of the same. The grounds raised in the PO have not been canvassed. My view of this matter is that the PO lacks merit for reasons that this court does not have the benefit of evidence by the Respondent in support of the PO. I will and do hereby dismiss the same.
10. Let the pending applications be canvassed to enable this court to determine their merits. To avoid further delay, I direct that parties file submissions in respect of the two applications to allow this court to determine them together. Each party shall take 21 days to file and serve each other with the submissions.
11. Costs shall be in the cause.
12. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 11TH APRIL 2024.

S. N. MUTUKU

JUDGE

