



REPUBLIC OF KENYA



**In re Pasaiba Tourmaline Limited (Insolvency Petition E031 of 2023)
[2024] KEHC 5351 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E031 OF 2023
FG MUGAMBI, J
MAY 14, 2024
IN THE MATTER OF PASAIBA TOURMALINE
LIMITED
AND
IN THE MATTER OF THE INSOLVENCY ACT
AND IN THE MATTER OF THE INSOLVENCY
REGULATIONS, 2016**

RULING

1. The application before Court is dated 28th July 2023 and is brought pursuant to regulations 6 and 19 of the *Insolvency (Amendment) Regulations 2018* (the insolvency regulations). The applicant seeks to cross examine the process server, one Benson Sila Mulumba on the issue of service of the Statutory Demand Notice and his affidavit of service dated 11th May, 2023 and eventually for striking out of the petition No. E031 of 2023.
2. The application is buttressed by the affidavit of Amos Kipkoech, the Managing Director of the applicant. It is contended by the applicant that the statutory demand subject of the current proceedings was not duly served upon the applicant.
3. In furtherance of this argument, the applicant challenges the veracity of the affidavit of service dated 11th day May 2023, executed by the court process server. It is contended that the said affidavit identifies an individual purportedly employed by the applicant by the name of Mr. Kiama, whom the applicant refutes is a member of its staff.
4. The applicant further states that the petition is an abuse of the liquidation process as the debt ought to have been pursued in a civil claim and not by way of insolvency proceedings.



5. The application is opposed vide a replying affidavit sworn by Dr. Galina Krumkacheva, the 2nd creditor and director of the 1st creditor on 19th October 2023. The respondent insists that the statutory demand was served on the applicant through its director, by way of email addressed to amos@pasaiba.com and info@pasaiba.com. The respondent confirms that besides this, the applicant was also served in person.

Analysis

6. The provisions of Order 5 rule 22B of the *Civil Procedure Rules* were introduced through Legal Notice No. 22 of 2020. Rule 22(1) expressly allows for electronic service in the following terms:

“Summons sent by electronic mail service shall be sent to the defendant's last confirmed and used e-mail address.”

7. From the aforesaid provision, the respondent is entitled to serve summons upon the applicant at his last confirmed and used e-mail address. Further, the Civil Procedure Rules have no suggestion that electronic service should be an alternative or substituted mode of service to physical service. This position has been supported in judicial pronouncements. I would cite by way of example, in *Mathews V Masika*, [2022] KEHC 12194 (KLR).
8. The court acknowledges, the electronic service upon the applicant via the email address amos@pasaiba.com. The court further notes that there had been communication between the parties and more specifically on 2nd June 2020, 16th March 2020, 26th May 2023 and again on 12th and 15th August 2022. It is important to note that in all these email communications the email that was used was the same amos@pasaiba.com.
9. The prayer to cross examine the process server even if allowed would therefore not alter the Court's earlier position that there was proper service. This is because in addition to physical service, service was also effected electronically. The applicant has not denied that the email address used belongs to him.
10. This Court echoes the sentiments stated in *Re Kipsigis Stores Limited* [2017] eKLR, that a creditor bears the onus of undertaking all necessary measures to ensure the statutory notice is brought to the attention of a debtor. This is a pure question of fact. In the circumstances, this court finds that there was proper service of the statutory notice on the applicant.
11. The applicant further avers that the filing of the petition was motivated by bad faith with the intention of tarnishing the applicant's reputation.
12. Under the *Insolvency Act*, a creditor (including judgment creditors such as the respondent) has the right to initiate insolvency proceedings against a debtor if the debtor is unable to pay its debts. The Act outlines the definition of inability to pay debts, which includes situations where a debtor fails to satisfy a statutory demand for a debt exceeding the prescribed threshold within the specified period or where execution or other process issued on a court judgment in favor of a creditor is returned unsatisfied in whole or in part.
13. The record shows that a partial judgment was issued by this Court on 23rd August 2022. There can therefore be no dispute as to proof of the debt. There is further evidence that the statutory notice was served and that the applicant failed to satisfy the debt. This is sufficient evidence that the applicant is insolvent, since no evidence has been led to prove that the said debt has been paid to date.
14. I disagree with the submission made by the applicant that a creditor should pursue insolvency as a last option for executing a decree obtained from a judgment. On the contrary, I am of the view that



insolvency proceedings can be initiated without first attempting other forms of execution provided that the prerequisites for insolvency are duly met.

15. With a judgment at hand, and an unsatisfied decree, this Court is of the view that the respondent was justified in instituting the insolvency proceedings.
16. Even supposing I was wrong on this view, the record further confirms that the respondent filed garnishee proceedings on 14th October 2022 before pursuing the present insolvency proceedings. I am therefore not convinced that the proceedings before this Court have been brought in bad faith or are inspired by malice as submitted by the applicant.
17. It has not been shown that the debt has been settled to date and it is therefore my finding that the insolvency petition is properly before this Court.

Determination

18. For these reasons, the application dated 28th July 2023 is devoid of merit and the same is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

