



**Team Construction Limited v Myspace Properties (K) Limited (Insolvency Cause E003 of 2022) [2024] KEHC 5132 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5132 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**INSOLVENCY CAUSE E003 OF 2022**  
**JWW MONG'ARE, J**  
**MAY 13, 2024**  
**IN THE MATTER OF THE INSOLVENCY ACT**  
**AND**  
**IN THE MATTER OF MYSPACE PROPERTIES (KENYA) LIMITED**  
**AND**  
**IN THE MATTER OF AN APPLICATION TO SET ASIDE A STATUTORY DEMAND**  
  
**BETWEEN**  
**TEAM CONSTRUCTION LIMITED ..... CREDITOR**  
**AND**  
**MYSPACE PROPERTIES (K) LIMITED ..... DEBTOR**

**RULING**

1. On September 15, 2021, the Applicant- M/s Team Construction Limited issued a statutory demand to the Company, Myspace Properties (K) Limited requiring the payment of Kshs.110,758,663/= within 21 days being the amount claimed against and arising from an Arbitral Award and decree issued by the Court in Misc. Cause No. 568 of 2014 on December 15, 2015.
2. Upon the Company failure to act on the statutory demand, the Petitioner- M/s Team Construction Limited, filed a petition the on February 2, 2022 seeking for the following orders:-
  - i. The Company (Myspace Properties(K) Limited) be liquidated under the provisions of the [Insolvency Act](#), 2015.
  - ii. The Court appoints the Official Receiver as the Provisional Liquidator.



- iii. Costs of this petition be granted to the Petitioner and be paid out of the Company's assets.
  - iv. Any other orders that this Honourable Court deems necessary and just in the premises.
3. By an application dated January 19, 2023, the Applicant/Debtor moved this Honourable Court seeking the stay of the Statutory Demand of 15<sup>th</sup> September 2021 and further insolvency proceedings herein. The Applicant faults the commencement of the Insolvency proceedings and argues that the alleged outstanding debt in question is incorrect. The Applicant that it had made several payments and has so far paid more than Kshs.10,000,000/= towards the same and hence reducing the debt.
  4. Further, the Applicant argues that the Petitioner is actively pursuing the execution of the decree in Misc. Cause No 548 of 2014 between the parties for the award of Kshs. 45 million and has at the same time issued a statutory demand and commenced insolvency proceedings, which contravenes the Insolvency Act.
  5. The Respondent opposed the Application and filed a Replying affidavit sworn on 25<sup>th</sup> May 2023. The Respondent argues that the issue raised of overstatement of the debt in the statutory demand cannot be a ground for setting it aside has the law has clearly set aside the steps a creditor ought to follow where it feels the debt claimed is more than the amount due. The Respondent argues that in such an instant, the debtor is called upon to settle the undisputed amount on the debt and proceed to challenge the overstated amount. The Respondent argues that this has not been done. In any event, the Debtor, though it alleges to have paid the sum of Kshs.10,000,000/= has not provided any evidence on how this amount was paid and only acknowledges receipt of Kshs.1,000,000/= instead.
  6. In urging the Court to dismiss the application for setting aside the statutory demand and allow the insolvency proceedings to proceed, the Respondent argues that the debt having arisen from a construction contract has been outstanding since 2014 and for the last ten years, the Applicant has not taken any steps to settle the debt, despite claiming to still be a solvent company and a going concern.
  7. Having perused the pleadings filed in this matter, the application and the supporting and replying affidavits and the rival submissions filed by the parties, I note that two issue arise for determination by the Court, to wit:-
    - i. Whether there is a valid Insolvency Proceedings before the Court against the Company and a proper Statutory Demand?
    - ii. Whether the Court should set aside the Statutory Demand and Stay the insolvency Proceedings.
  8. As to whether there is a valid Insolvency Proceedings before the Court against the Company and a proper statutory demand, the Court is guided by the provisions of section 425 of the Insolvency Act which provides as follows; “(1) An application to the Court for the liquidation of a company may be made any or all of the following—
    - a. ....
    - b. a creditor or creditors (including any contingent or prospective creditor or creditors);”
  9. Regulation 77B of the Insolvency Regulations, 2016 provides as follows:-
 

77B

    - (1) For the purposes of section 425 of the Act an application for liquidation shall be-
      - a. By way of a petition in Form 32C as set out in the first schedule; and



- b. Accompanied by a verifying affidavit in Form 32D as set out in the First Schedule.
  - 2. The Petition for liquidation shall be accompanied by the following documents:-
    - a) A statutory demand in Form 32E set out in the First Schedule if the reason for petition is indebtedness.
    - b) A statement of financial position in form 32 as set out in the first schedule where necessary.
- 10. Section 384 (1) (a) of the Act sets out the essential ingredients of a statutory demand as follows:-  
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  - (1) for the purposes of this Part, a company is unable to pay its debt-
    - a. If a creditor (by assignment or otherwise) to whom the company is indebted for hundred thousand shillings or more has served on the company by leaving it at the company's registered office, a written demand requiring the company to pay the debt and the Company has for twenty-one days afterwards failed to pay the debt or to secure a compound for it to the reasonable satisfaction of the creditor.”
- 11. I have looked at the Petitioner filed by the Petitioner before this Court and dated February 2, 2022 and the statutory demand issued by the Petitioner on September 15, 2021 and I am satisfied that the said proceedings comply with the Provisions of section 425 of the *Insolvency Act* and regulations 77B of the *Insolvency Regulations*. I am further satisfied that the statutory demand issued on September 15, 2021 is in conformity with section 384 of the *Insolvency Act*. I find and hold therefore that there are before this Court valid insolvency proceedings and a proper statutory demand has been issued to the petitioner in compliance with the law.
- 12. The second issue identified by the Court is whether the Court should set aside the statutory demand and stay the insolvency proceedings by the petitioner to the Company. The Applicant filed the present application arguing that the company is not insolvent and is a going concern still engaged in the construction business for various other entities. In the supporting affidavit to these proceedings, the Applicant argues that it has been settling other debts that are not exaggerated such as the debt by the Petitioner and that the Court should not allow the liquidation petition filed.
- 13. In addition, the Applicant claims that the reasons that it has failed to settle the debt by the Petitioner is because the debt is overstated and that it has in the past made some payments towards reducing the debt and claims to have so far paid a total of Kshs.10,000,000/= from the decree first issued at Kshs.45,000,000/=, a fact which was denied by the petitioner.
- 14. I have noted that the dispute subject matter of these proceedings arose from a construction contract entered into by the parties which then gave rise to a Civil Suit in Misc. Cause No.568 of 2014 and a subsequent Arbitral Award that was entered into by consent on September 14, 2014 for the payment of Kshs.4,0740,000/= that have subsequent pursuant to several failed execution attempts risen to the current amount of Kshs.110,758,663/= as per the statutory demand.
- 15. I note in its defence, the Applicant argues that the said amount claimed is an overstatement and that it has overtime paid part of the amount set out in the Arbitral Award and the amount remaining unpaid is far much less.



16. Regulation 17(6) of the Insolvency Regulations provide as follows:-

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- (6) “an overstatement in a statutory demand for the amount owing by the debtor does not invalidate a demand unless:-
- a. The debtor notifies the creditor that the debtor disputes the validity of the demand because it overstates the amount owing; and
  - b. The debtor makes that the notification with the period in the demand for the debtor to comply with it.

17. Further the Court in the case of Peter Munga vs. African Seed Investment Fund LLC(2017) eKLR, the Court in declining to strike out a statutory demand observed as follows:-

“It is important to point out that the mere overstatement of amount claimed in a statutory demand does not per se invalidate the demand. The debtor is obligated to contest the amount and within the requisite period and additionally it must be such as to cause prejudice and injustice to the debtor if the demand was allowed to subsist.”

18. In considering the question whether the Court should stay the insolvency proceedings and set aside the statutory demand, I must acknowledge that the claim herein has been outstanding for a long period of time. I note that the statutory demand having been issued on September 15, 2021 and the insolvency proceedings commenced on 2<sup>nd</sup> February 2022 the present application was filed before this Court on 19<sup>th</sup> January 2023. The period set by law to contest the Statutory demand was within the period of the demand as per regulation 17(6) of the Insolvency Regulations and this therefore means any contest made to the amount claimed should have been made within 21 days from September 15, 2021. This was not done and therefore the amount so claimed in the statutory demand is deemed to be due and owing. Further, and in addition, there has been no material placed before the Court to establish the allegation that this amount so claimed is overstated and that the Applicant has been making payments to settle the same. In the absence of such evidence, the Court is left to conclude that the Applicant has not treated this matter with seriousness but has been very casual towards the same.

19. I am therefore not persuaded that the applicant is deserving of the prayers sought in its application. The application seeking to stay the insolvency proceedings and set aside the statutory demand is therefore dismissed for lack of merit with costs to the Petitioner.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY, 2024.**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

1. Ms. Akello for the Petitioner/Respondent.
2. Mr. Kaimenyi for the Respondent/Applicant.
3. Amos - Court Assistant

