



**BN Kotecha & Sons Limited v Shah (Insolvency Notice E166 of 2022)  
[2024] KEHC 8601 (KLR) (Commercial and Tax) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8601 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY NOTICE E166 OF 2022**

**AA VISRAM, J**

**JULY 15, 2024**

**BETWEEN**

**BN KOTECHA & SONS LIMITED ..... DEBTOR**

**AND**

**SAJNI SHAH ..... CREDITOR**

**RULING**

1. I have considered the Notice of Motion application dated 13<sup>th</sup> January, 2022, together with the affidavit in support sworn on even date; the replying affidavit sworn in opposition to the same on 30<sup>th</sup> May, 2023; the submissions of counsel, and the relevant law.
2. The Applicant is seeking to set aside the statutory demand dated 15<sup>th</sup> July, 2022, of the Respondent Creditor.
3. Counsel for the Applicant submitted that the debt is wholly disputed. The evidence before the court is that the same was actually an investment, and not a loan. She pointed out that the Annexure at page 60 of the supporting affidavit supports this view.
4. She contended that the Respondent has since received money from the Applicant as a return on investment which exceeds the amount allegedly loaned to the Applicant. She submitted that the court ought not treat an investment as a loan; and finally, contended that the company is an ongoing concern, and ought not to be subjected to liquidation proceedings.
5. Meanwhile, the Respondent submitted that the agreement at page 60 of the supporting affidavit is actually evidence of a loan. Counsel submitted that the Respondent loaned funds to the Applicant, and that the same is due, together with interest. Counsel submitted that money was received by the Applicant, and the same is evidenced at Annexure SS7 of the replying affidavit.



6. The Respondent admitted that the Creditor filed a joint statutory demand in Insolvency Cause Number 038 of 2021, however, it submitted that those proceedings have since been concluded.
7. The Respondent submitted that in the ruling issued on 18<sup>th</sup> March, 2022, the court stated that the statutory demand dated 15<sup>th</sup> June, 2021, was defective. Accordingly, the Creditor had no recourse available other than to file a fresh statutory demand. It relied on *Cosmas Mrombo Moka v Co operative Bank of Kenya Ltd & Another* (2018) eKLR in support of the position that where a suit is dismissed “without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as *res judicata*.”
8. Further, counsel submitted that the debt has been admitted, and evidence of the same is found at paragraph 9 of the Debtor’s supporting affidavit marked as Annexure SS4 in Creditor’s replying affidavit. Accordingly, the Applicant has not discharged the burden of proving that the debt is disputed and substantial grounds.
9. Having considered the above, the starting point is the issue of jurisdiction. I am persuaded that this court, as a court of unlimited and original jurisdiction, has the jurisdiction to strike out a statutory demand that is defective. In *Libyan Arab African Investments Company Kenya Limited* [2021] eKLR, the court said as much in the following terms:-

“Since it is common ground that PART V of the Regulations apply to personal bankruptcies and not liquidations or insolvencies of companies, does this mean that a company has no recourse when a statutory demand has been served upon it? I do not think so. I say so and repeat the court’s holding in *DAC Aviation (EA) Limited v Stevenson Kibara Ndung’u & 8 others (supra)* that the court still retains inherent jurisdiction to strike out a statutory demand that is not well founded and amounts to an abuse of the court process notwithstanding that a specific provision does not exist in the Regulations and that the factors underlined in Regulation 17(6) of the Regulations governing the exercise of discretion to strike out a statutory demand in case of bankruptcy are equally relevant in the case of insolvency of a Company.”

10. The main issue for determination is therefore whether the court should set aside the statutory demand. A statutory demand is ordinarily issued where a company is unable to pay its debts. Section 384(1) of the *Act* outlines the circumstances in which a company is unable to pay its debts as follows:-
  - (1) For the purposes of this Part, a company is unable to pay its debts—
    - a. if a Creditor (by assignment or otherwise) to whom the company is indebted for a 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 or compound for it to the reasonable satisfaction of the Creditor;
    - b. if execution or other process issued on a judgment, decree or order of any court in favour of a Creditor of the company is returned unsatisfied in whole or in part; or
    - c. if it is proved to the satisfaction of the Court that the company is unable to pay its debts as they fall due. [Emphasis mine]
11. Regulations 16 and 17 of the *Insolvency Regulations*, 2016 outline the grounds for setting aside a statutory demand, and the procedure to be followed once it has been issued. The provisions state, in part, as follows:-



16. Application to set aside statutory demand

- (1) The Debtor may, apply to the Court for an order to set aside the statutory demand—
  - (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.
- (2) 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.

Regulation 17 (6) on Hearing of application to set aside statutory demand states,

- (6) The court may grant the application if—
  - (a) 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;
  - (b) the debt is disputed on grounds which appear to the court to be substantial;
  - (c) 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
  - (d) the court is satisfied, on other grounds, that the demand ought to be set aside.

12. As stated above, the Debtor argued that the debt is disputed on substantial grounds, namely, that the subject matter of the statutory demand was not a loan, but rather, an investment in the Applicant's company. Further, it submitted that almost Kshs. 23,000,000/- has been paid to the Respondent in return for its investment to date.

13. As regards the above issue, the Court of Appeal, in *Universal Hardware Limited v African Safari Club Limited* MSA CA Civil Appeal No. 209 of 2007 [2013] eKLR, provided the following guidance after reviewing several decisions:-

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 bonafide, 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.

14. Looking at the record, neither of the parties have produced a credible copy of the alleged loan agreement between the parties. In the circumstances, there is no evidence before this court that the money was indeed lent by the Creditor to the Applicant, based on specific terms, and timelines, within which repayment would take place.

15. Moreover, I do not think that the document Annexed as SS1 to the Respondent's replying affidavit provides this court with sufficient information to determine either the terms, or even the parties, to



the handwritten agreement. The document appears to be no more than mathematical calculations, and the same does not clearly indicate who the parties to the agreement are; what was agreed to; and by when payment was due. Additionally, the Respondent, did not by way of deposition, provide any further clarifications in relation to the precise terms of the agreement.

16. Similarly, Annexure SS7 of the Respondent's replying affidavit appears to be the Respondent's document. The same is titled "Summary of Receipt of Funds". There is however nothing connecting that document to the agreement between the parties referred to above. I find this evidence to be of little value.
17. To my mind, a loan becomes due on a specific date of repayment. In the absence of the terms as set out above, this court ought not speculate, or re write contracts between the parties. I also hold this view in relation to the Respondent's submission that the debt was admitted, and that proof of the same is found at Paragraph 9 of Annexure SS4 of the replying affidavit.
18. Additionally, it is not lost on me that no sufficient explanation has been provided as to why several statutory demands have been served on the Applicant concerning the same subject matter in multiple proceedings. I do not think that this is proper and the court draws adverse inferences arising out the same.
19. Based on the above, I am of the view that the Creditor has not made out a proper basis upon which the statutory demand was served; and I am satisfied that the debt is disputed on bona fide and substantial grounds. Accordingly, I hereby set aside the statutory demand dated 15<sup>th</sup> July, 2022. Prayers No. 3, 4, and 7 only are granted.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF JULY 2024**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

For the Debtor/Applicant

For the Creditor/Respondent

