



REPUBLIC OF KENYA



**Lubulellah & Associates v Vinayak Builders Limited (Insolvency Notice E057 of 2022)
[2024] KEHC 8887 (KLR) (Commercial and Tax) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E057 OF 2022**

MN MWANGI, J

JULY 11, 2024

BETWEEN

LUBULELLAH & ASSOCIATES CREDITOR

AND

VINAYAK BUILDERS LIMITED DEBTOR

RULING

1. The application before me is a Notice of Motion dated June 21, 2022 filed pursuant to the provisions of Order 51 Rule 1 of the *Civil Procedure Rules, 2010*, Section 384 of the *Insolvency Act, 2015*, Sections 1A, 1B & 3A of the *Civil Procedure Act*, Regulations 17(b) & 77(b) of the *Insolvency (Amendment) Regulations, 2018*. The debtor/applicant seeks the following orders -
 - i. That this Honourable Court be pleased to order stay and set aside the statutory demand dated May 24, 2022, noting that the applicant has filed an application dated June 14, 2022 seeking leave to file taxation reference out of time of taxation ruling dated November 12, 2021 in Misc. Application No. E187 of 2021 *Lubulellah & Associates -vs- Vinayak Builders Limited*; and
 - ii. Costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on June 21, 2022 by Premji Vekaria, the debtor's Managing Director. In opposition thereto, the creditor filed a replying affidavit sworn on July 27, 2022 by Eugene Lubale Lubulellah, an Advocate of the High Court of Kenya practicing as a partner in the creditor law firm.
3. The application herein was canvassed by way of written submissions. The debtor's submissions were filed by the law firm of Tito & Associates on October 13, 2023, whereas the creditor's submissions were filed by the law firm of Lubulellah & Associates on October 27, 2023.



4. Ms. Bakari, learned Counsel for the debtor cited the provisions of Regulation 16 (1)(a) of the *Insolvency Regulations, 2016* and submitted that the time for filing an application to set aside a statutory demand starts running from the date of service of the said statutory demand. She indicated that in this case, the creditor's statutory demand dated May 24, 2022 was served on the debtor on June 3, 2022, thus the time within which to file the instant application started running on June 3, 2022. She submitted that since the application herein was filed on June 21, 2022, it was filed 18 days from the date of receipt of the statutory demand, and that the instant application was filed within the stipulated timeline.
5. Counsel referred to the provisions of Regulation 16 of the *Insolvency Regulations, 2016* and stated that the debtor is disputing its indebtedness to the creditor, which issue is before the Court for determination. Further, that High Court Comm Misc. App No. E187 of 2021, has a stay pending hearing and determination of the suit involving the parties herein, where the debtor is seeking production of accounts by the creditor in a bid to establish that it has fully paid the creditor. She stated for the said reason, and until the Court renders a decision on the aforesaid issue, the debtor maintains that it paid the creditor its legal fees hence it does not owe it any money.
6. Ms. Bakari relied on the Court of Appeal case of *Universal Hardware Limited v African Safari Club Limited* [2013] eKLR and the case of *Flower City Limited v Polytanks & Containers Kenya Limited* (Insolvency Cause 033 of 2020) [2021] KEHC 34 (KLR) and contended that the statutory demand filed by the creditor should be set aside for reasons that it is premature and should it be allowed to proceed, it will render the debtor's suit being HCCOMM No. E401 of 2022 nugatory, thus causing the debtor to suffer loss and damage.
7. Mr. Lubulellah, learned Counsel for the creditor referred to the provisions of Regulation 16 of the *Insolvency Regulations, 2016* and submitted that the debtor failed to challenge the statutory demand dated May 24, 2022 within the prescribed timelines which lapsed on June 14, 2022, and has also failed to seek leave of the Court to file the instant application out of time, thus rendering the application herein both time and statute barred. He relied on the decisions in *Peter Muunga v Arica Seed Investment Fund LLC* [2017] eKLR and Insolvency Notice No. E031 of 2020, *Philip Muturi Mwangi v Pauline Waniiru Nyamu* and submitted that the debtor has failed to prove the existence of any of the circumstances under which a statutory demand may be set aside as provided for under Paragraph 6 of Regulation 17 of the *Insolvency Regulations, 2016*.
8. Counsel relied on the case of *Invesco Assurance Company Ltd v Nyamira Luxury Express Ltd & 2 others* [2020] eKLR and stated that the debtor does not dispute the debt, it does not have a counterclaim, set-off or a cross demand that exceeds the debt amount. In addition, that the creditor does not hold any security in respect of the debt, thus there is no reason established by the debtor to warrant the setting aside of the statutory demand dated May 24, 2022. Mr. Lubulellah stated that to the contrary, the creditor has discharged its burden of proving that the debtor is unable to pay its debts as provided for under Section 384(1) *Insolvency Act*, 2015 by demonstrating that the debtor has failed to satisfy the subject judgment debt despite service of a statutory demand upon it. Thus, the creditor is apprehensive that the debtor is insolvent and cannot pay its debts.

Analysis and Determination.

9. I have considered the application herein, the affidavit filed in support thereof, the replying affidavit by the creditor as well as the written submissions by Counsel for the parties. The issues that arise for determination are-
 - i. Whether the instant application is time and statute barred; and



- ii. Whether the statutory demand dated May 24, 2022 should be set aside.
10. The debtor in its supporting affidavit deposed that it was in a Client-Advocate relationship with the creditor who acted for it in the enforcement of an Arbitral Award. That thereafter, the creditor filed an Advocate-Client Bill of Costs dated March 24, 2021 in Nairobi HCCOMM Misc. App. No. E187 of 2021; *Lubulellah & Associates Advocates v Vinayak Builders Limited*.
 11. The debtor averred that a ruling on the said Bill of Costs was delivered by the Taxing Officer on November 12, 2021 awarding the creditor Kshs. 5,756,023.04. That subsequently, judgment was entered in favour of the creditor by Judge D. S. Majanja on May 16, 2022 as per the Certificate of Costs issued by the Taxing Officer.
 12. The debtor further averred that it then filed an application dated May 27, 2022 seeking to review the Court's order issued on May 16, 2022 but the said application was dismissed by Judge D. S. Majanja on June 10, 2022.
 13. The debtor stated that it has now filed a proper application seeking leave to review the Taxing Officer's ruling on grounds that it had paid the creditor its legal fees as agreed, thus the Taxing Officer's taxation was unjustly high. It stated that the said application is pending and is scheduled for mention on June 30, 2022 before Justice Majanja for directions.
 14. In view of the foregoing, the debtor deposed that the statutory demand in this case has been filed prematurely since in the event that the debtor's pending application for leave to review the Taxing Officer's ruling is decided in the debtor's favour, it will dispose of the debt claimed by the creditor.
 15. The creditor in its replying affidavit averred that it obtained entry of judgment in Nairobi HCCOMM Misc. App. No. E187 of 2021; *Lubulellah & Associates Advocates v Vinayak Builders Limited* against the debtor on May 16, 2022 and a decree was duly issued by this Court on May 17, 2022 pursuant to Section 51(2) of the *Advocates Act*. It further averred that the said judgment and decree have never been set aside on appeal or otherwise, and that the debtor's application to seeking to review the said judgment was dismissed by Hon. Justice Majanja.
 16. It was stated by the creditor that the allegations of payment of Kshs.6,282,000/= by the debtor to the creditor are *res judicata* having already been determined by the Taxing Officer and dismissed in the debtor's reference. That in any event, the debtor has exhausted all its remedies under the *Advocates Act*.
 17. The creditor contended that the statutory demand in this case has met all the requirements set out under Forms No. 6 and 32E of the *Insolvency (Amendment) Regulations, 2018*, and the debtor failed to challenge the said statutory demand within the 21 days' period stipulated under the law, thus the instant application should be dismissed.
 18. The creditor asserted that it is genuinely apprehensive that the debtor is insolvent as garnishee proceedings instituted by it returned the decree unsatisfied in whole, since the debtor's bank by the name Victoria Commercial Bank Limited reported to the Court that the debtor is in the red and in fact owes it a substantial amount of money.

Whether the Instant Application is Time and Statute Barred.

19. Applications to set aside statutory demands are provided for under Regulation 16 of the *Insolvency Regulations, 2016* which states that –

“(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.
 - (3) The debtor's application shall be in Form 7 set out in the First Schedule and shall be supported by an affidavit, which shall be in Form 8 set out in the First Schedule.
 - (4) The affidavit referred to under paragraph (3) shall -
 - a. specify the date on which the statutory demand came into the debtor's possession;
 - b. state the grounds on which the debtor claims that it should be set aside; and
 - c. annex a copy of the statutory demand.” (Emphasis added).
20. Regulation 16(1)(a) of the *Insolvency Regulations, 2016* provides that an application seeking to set aside a statutory demand ought to be filed within twenty-one (21) days from the date of the service on the debtor of the statutory demand. In this case, it is not disputed that the creditor was served with the statutory demand dated May 24, 2022 on June 3, 2022, thus time within which to file the instant application started running on June 3, 2022. For this reason, the time within which the debtor could file an application seeking to set aside the said statutory demand started running on June 3, 2022 as opposed to May 24, 2022 as contended by the creditor.
21. In light of the above, the instant application ought to have been filed on or before June 24, 2022. Therefore, the application herein having been filed on June 21, 2022 was filed within the stipulated timelines, hence it is neither time nor statute barred.

Whether the Statutory Demand Dated 24th May, 2022 should be Set Aside.

22. Regulation 17(6) of the *Insolvency Regulations, 2016* provides for grounds on which the Court may allow an application seeking orders for the setting aside of a statutory demand. It sates as hereunder –
- “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.”

23. In determining an application to set aside a statutory demand, Courts have to determine whether the applicant has established either, or all the grounds set out under Regulation 17(6). In the instant application, the applicant seeks to set aside the statutory demand on the ground that the alleged debt is disputed. In *Universal Hardware Limited v African Safari Club Limited* (*supra*), the Court of Appeal summarized the position regarding the striking out of a petition on account of a disputed debt as follows -

“The principle as I understand is that a disputed debt on substantial and *bona fide* grounds cannot be the subject of a winding-up proceedings on account of the company’s inability to pay its debts. The case law and scholarly writings are categorical that a creditor’s petition should not be entertained if it is to enforce a debt that is disputed and the company is solvent, otherwise it will be treated as a scandalous and abuse of the process of the court and will be struck out on that basis.”

24. On perusal of the pleadings filed before this Court, it is evident that the following salient facts are not disputed. The creditor and the debtor were in an Advocate-Client relationship, wherein the creditor acted for the debtor in a suit seeking enforcement of an Arbitral Award. As a result of the said suit, the Creditor filed an Advocate-Client bill of costs dated March 24, 2021 in Nairobi HCCOMM Misc. App. No. E187 of 2021 against the debtor, which bill was taxed at Kshs. 5,756,023.04 vide a ruling delivered on November 12, 2021 by the Taxing Officer. Subsequently, a Certificate of Costs was issued by the Taxing Officer., Judge D. S. Majanja on application by the creditor entered judgment against the debtor on May 16, 2022 as per the Certificate of Costs issued by the Taxing Officer. Thereafter, a decree was issued to the creditor by the Court on May 17, 2022.

25. The debtor averred that vide an application dated May 27, 2022 it tried to review the Court’s orders of May 16, 2022, but the said application was dismissed by Judge D. S. Majanja on June 10, 2022. The debtor has since filed a Notice of Motion application dated June 14, 2022 seeking *inter alia* an order for leave to file a Reference out of time against the ruling by Hon. Stephany Githongori delivered on November 12, 2021, and an order for stay of execution of the said taxation ruling. On perusal of the order issued by the Court on June 17, 2022 as a result of the debtor’s application dated June 14, 2022, it is evident that the said application was not certified urgent and no orders for stay of execution were granted.

26. As was correctly submitted by Counsel for the creditor, there is currently no order staying, varying and/or setting aside the ruling dated November 12, 2021, the order entering judgment for the creditor issued on May 16, 2022, and/or the decree issued on May 17, 2022 in favour of the creditor. This means that the creditor is the holder of a valid decree from this Court and has every right to enforce and/or execute it. In the case of *Flower City Limited v Poly tanks & Containers Kenya Limited* (*supra*) Mativo J (as he then was) in disallowing an application similar to the present one held that –

“The rationale for applications of this nature is to enable the debtor to satisfy the court that he genuinely disputes the debt. 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.”

27. The Learned Judge further held that –

“It is important to point out that once a debtor shows that even one issue has a sufficient degree of cogency to be arguable, a finding of genuine dispute must follow. The meaning of the expression “genuine dispute” connotes a plausible connection requiring investigation, and raises much the same sort of considerations as the serious question to be tried” criterion which arises on an application for an interlocutory injunction.”

28. Order 42 Rule 6(1) of the [Civil Procedure Rules, 2010](#) provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from. Therefore, the fact that the debtor has since filed a proper application seeking leave to review the Taxing Officer’s ruling does not stop the creditor from executing its valid decree. In addition, the debtor has not demonstrated that it has a counterclaim, set-off or cross demand that exceeds the debt amount. Accordingly, it is my finding that the debtor has not demonstrated to this Court the existence of a genuine dispute of the debt owed to the creditor to warrant being granted the orders sought herein.

29. It is evident from the pleadings that the debtor has neither started paying the debt owed to the creditor nor has it offered a proposal for payment with definite and/or specific timelines within which it intends to pay the said debt. Further, the debtor company has not demonstrated to this Court that it is solvent and that it has the capability of paying its genuine debts as and when they fall due. In the premise, this Court finds that the debtor has not made out a case to warrant the setting aside of the statutory demand dated May 24, 2022.

30. In the end, I find that the application dated June 21, 2022 is bereft of merits. It is dismissed with costs to the creditor/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ogendo for the Debtor/Applicant

Mr. Wendoh h/b for Mr. Lubullelah for the Creditor/Respondent

Ms B. Wokabi – Court Assistant.

