



REPUBLIC OF KENYA



**Weza Venture Limited v Obutu (Insolvency Notice E021 of 2024)
[2024] KEHC 8724 (KLR) (Commercial and Tax) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY NOTICE E021 OF 2024**

PM MULWA, J

JULY 18, 2024

BETWEEN

WEZA VENTURE LIMITED APPLICANT

AND

ZEDEKIAH WYCLIFFE OBU TU RESPONDENT

RULING

1. This ruling determines the application dated 31st January 2024 brought under Section 384 of the *Insolvency Act*, 2015, regulations 16, 17(1), 6(c) and (d) of the *Insolvency Regulations, 2016*. The applicant seeks the setting aside of the statutory demand dated 21st December 2023 as well as a stay of any further insolvency proceedings arising from the statutory demand.
2. The application is premised on the grounds set out thereon, and is supported by the affidavit and supplementary affidavit sworn by Samuel Njuguna on 31st January 2024 and 14th March 2024 respectively. He avers the applicant received a statutory demand dated 21st December 2023 demanding the payment of Kshs. 23,430,090/=.
3. The case by Weza Venture Limited is that it created a “Weza app” mainly used by banks and financial institutions. In the process of acquiring new investors as per the agreement dated 1st January 2020, the respondent agreed to provide it with an unsecured loan facility of the sum of Kshs. 10,500,000/= which was disbursed in eleven monthly instalments. The loan amount ejected into the business was converted into equity with the respondent acquiring 250 shares in the company at the rate of 223,367/= per share. Consequentially, the respondent was appointed a director and shareholder of Weza Venture Limited. The applicant avers that by a Rescission and Mutual Agreement dated 30th June 2020, the respondent forfeited the 250 shares back to the company with an undertaking to eject more capital in the business, which he failed to do.



4. In the spirit of enlarging the company the applicant sourced for new investors, it entered into a contract with Quantum Technologies Limited, a limited company based in Ethiopia however the arrangement was thwarted by war. It contends the non-payment of the loan facility is characterised by force majeure.
5. The applicant contends the statutory demand is being used to arm-twist a party to pay a debt that is not due. It is averred that the respondent being a director of the applicant cannot issue a statutory demand to the applicant under section 384 of the *Insolvency Act* and that the only option available for the director is under section 398 thereof.
6. The application is opposed vide the replying affidavit of Wycliffe Obutu sworn on 23rd February 2024. He avers that the application is incompetent for being sub judice to HCCOMIN No. E001 of 2024 between the same parties. According to him, the current application is premature and a sham aimed at preventing the applicant from making good the acknowledged debt and a mechanism to deny the Respondent seeking legal redress for the non-payment of the debt.

Analysis and Determination

7. I have considered the application, the affidavits in support and against the application and submissions by the parties together with the authorities cited. The main issue for determination is whether the Statutory demand ought to be set aside.
8. 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.
9. Regulation 17(6) provides for the process of hearing an application to set aside a statutory demand, as follows:

17(6) The court may grant the application if;

 - a. The Debtor appears to have a counter-claim, set off or cross demand which equals or exceeds the amounts of the debt 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 not 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.
10. The provisions of the above regulation allow the court unfettered jurisdiction to determine an application for setting aside a statutory demand. In the case of *Peter Munga v African Seed Investment Fund* LLC [2017] eKLR it was held that;
- “...it is evident when one reads paragraph (d) above that the grounds for the setting aside of a statutory demand are not limited by statute and it opens it up and gives the court a spacious discretion. It is certainly not possible to foresee all the instances which may properly fall under paragraph (d) of Regulation 17. My view is that, when asked to set aside a demand on any other ground other than the grounds stated under paragraphs (a), (b) and (c), the question then becomes whether the applicant-debtor can show a substantial reason akin to the reasons under the preceding three paragraphs...The test, which is not necessarily conclusive, is whether it would be unjust for the statutory demand to give rise to insolvency proceedings in the particular case.”
11. From the record, the applicant does not dispute owing the respondent but the amount in question as demanded is disputed based on the interest. The applicant faults the non-payment of the debt to the COVID-19 pandemic that hit the country immediately after executing the contract between the applicant and the respondent that hampered the applicant's operations. The applicant also faults the war in Ethiopia that hampered the execution of the contract. According to the applicant's director, the applicant has had some challenges in conducting business as it was a start-up business that required marketing and capital injected for it to thrive in the market.
12. The applicant also faults the respondent for employing the insolvency proceedings in reclaiming his debt from a company in which he is a director. The applicant contends that this is contrary to Section 384 of the *Insolvency Act* and raises the issue of conflict of interest.
13. The court notes the applicant is a start-up business which ought to be allowed to grow and venture into the business world, therefore allowing the statutory demand to take effect is tantamount to killing its existence which will serve substantial injustice to the business. On the other hand, the respondent is entitled to the money injected in the business and is using the insolvency proceedings to put pressure on the applicant to pay the debt.
14. Under Section 384(1)(a) of the Insolvent Act, a company is unable to pay its debt if it fails to act on a statutory demand as required and within the stipulated timelines. The creditor is expected to prove that indeed it is not insolvent and it is in a position to pay the debt.
15. The applicant avers it can pay the loan due as its intellectual property and intangible assets are valued at Kshs. 160, 686,948/= as per the 2022 Financial Statement of Accounts. However, the applicant has not issued a proposal on how the loan would be cleared.
16. I have considered the grounds as set by the applicant and it is my finding that it has not established sufficient grounds to warrant the setting aside of the statutory demand.
17. Consequently, the applicant's application dated 31st January 2024 is unmerited and the same is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 18TH DAY OF JULY 2024.

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P. MULWA

JUDGE

In the presence of:

Ms. Muthoni h/b Mr. Otieno for applicant

Mr. Tolle for respondent

Court Assistant: Carlos

